SUPREME COURT, U. S.
JUN 4 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

Of Counsel:

ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, HOUSTON

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OPINIONS BELOW

The opinion and judgment of which review is sought in this antitrust treble damage action is *Woods Exploration & Producing Company, Inc., et al* v. *Aluminum Company of America, et al,* Nos. 72-2792, and 73-1633, in which the Slip Opinion and judgment were dated March 13, 1975. (Appendix 107) This opinion and judgment affirmed two separate judgments independently appealed and briefed but consolidated for oral argument. The consolidated appeals were each separately affirmed in the single opinion and judgment issued in No. 72-2792 and on April 24, 1975, a Petition for Rehearing therein was denied. (Appendix 129)

Judgment was originally entered for the defendants, the petitioners here, by the granting of a partial summary

judgment in *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 284 F. Supp. 582 (S. D. Tex. 1968), (Appendix 1) and thereafter, the trial judge rendered judgment for the defendants on the remainder of the case notwithstanding the jury verdict in *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 304 F. Supp. 845 (S. D. Tex. 1969). (Appendix 25) Thereafter, these judgments were reversed and remanded by the Court of Appeals in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 5th Cir., 1971, 438 F. 2d 1286 (cert. denied) 1972, 404 U.S. 1047. (Appendix 38)

After the reversal of the judgment in favor of these petitioners, a different trial judge trifurcated the case which had been held to be a suit on one cause of action by the Court of Appeals in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 438 F. 2d 1286, *supra*, in order to avoid the four-year bar of the statute of limitations contained in Section 4 (b) of the Clayton Act, 15 U.S.C.A. § 15. After the trifurcation, the plaintiffs totally abandoned the portion of the case upon which the action was solely predicated for more than four years after its filing and as to which partial summary judgment had been granted to defendants, i.e., the alleged combination between the defendants to make false forecasts of market demand for gas from the Carancahua Field in Jackson County, Texas, to the Railroad Commission of Texas. This part of the supposed single cause of action as to which the trial court had granted summary judgment under the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), was dismissed with prejudice. The new trial judge then entered judgment for

the plaintiff based on the jury verdict at the first trial on the second splinter of the now fragmented case, which involved a gas pipeline only, for the amount of damages found therefor by the first jury trebled. From this, the Defendants as Petitioners took appeal to the Court of Appeals in Cause No. 72-2792.

Thereafter, the new trial judge then conducted a separate jury trial on the third splinter of the supposed single cause of action, which involved solely a gasoline extraction plant. Appeal was taken from the adverse judgment entered on a jury verdict against Petitioners on this splinter of the case in No. 73-1633. After oral argument before the Court of Appeals of 72-2792, it was ordered consolidated with 73-1633 and reargument ordered in the consolidated cases. This reargument occurred on December 4, 1973; and on March 13, 1975, the Slip Opinion and the judgment affirming both cases were issued.

A copy of the opinion of the Court of Appeals in the consolidated cases, the judgment therein and the denial of the Petition for Rehearing thereof are all printed as parts of a separate Appendix which, due to the length of the opinion and related matters, has been prepared and filed herewith pursuant to Rule 23(i) of this Court. The one opinion written by the District Court on the second of the two judgments in this case now attacked, together with the two District Court opinions of the first trial judge and the prior Court of Appeals opinion in this case, are also printed in the separate Appendix.

Although not strictly "companion cases," three decisions by the Supreme Court of Texas between these same parties involving essentially the same controversy are such an integral part of the controversy between the parties and so

essential to an understanding and an evaluation of the issues involved, that such opinions are also reproduced as a part of the separate Appendix. *Railroad Commission* v. *Woods Exploration & Producing Co., Inc.*, 405 S.W.2d 313 (Tex. 1966), Appendix p. 130; *Railroad Commission* v. *Aluminum Company of America*, 380 S.W.2d 599 (Tex. 1964), Appendix, p. 164; *Benz-Stoddard* v. *Aluminum Company of America*, 368 S.W.2d 94 (Tex. 1963), Appendix p. 173.

GROUNDS OF JURISDICTION

The opinion and the judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed were dated and entered on March 13, 1975. A Petition for Rehearing En Banc was denied by order dated and entered on May 7, 1975. No extension of time for the filing of this petition has been sought. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether prejudicial error denying Petitioners that fair trial and due process of law guaranteed by Amendment V to the Constitution of the United States was committed by the trial court in the second jury trial in twice reading to the jury and in permitting extensive argument and comment by Respondents' counsel upon the adverse verdict returned against the Petitioners by another jury in a prior trial of the same cause of action.

2. Whether this case held to be upon one cause of action could nevertheless be fragmented into three parts and a partial, final judgment entered on one segment of the single cause of action under Rule 54(b) of the Federal Rules of Civil Procedure.

3. Whether this case held to be upon a single cause of action could nevertheless be trifurcated with one resulting splinter thereof being dismissed with prejudice and with separate judgments for separate amounts being entered on two separate jury verdicts returned in two separate trials of the other two splinters of the single cause of action, in the second of which the trial court bound the Defendants by the first jury's finding of a Section 2 Sherman Act violation and prohibited the trial therein of the liability or anti-trust violation issue.

4. Whether Petitioners have been accorded that fair trial and that due process of law guaranteed to them by the Constitution of the United States, when though there have been two trials of two different parts of a single cause of action before two different juries and two judgments entered thereon, there was excluded from the trial of each case and Petitioners were denied the right to introduce in evidence before either jury the fact that the Plaintiffs-Respondents had drained and confiscated vast quantities of gas from under Petitioners' lands and had thereby produced more gas from their tiny percentage of the total acreage than Petitioners had been able to produce from this acreage of which they were convicted of having obtained a Section 2 Sherman Act monopoly.

5. Whether Petitioners have been accorded that jury trial and that due process of law guaranteed to them by the Seventh and Fifth Amendments to the Constitution of the United States when they have not been permitted to develop before any jury the most relevant and compelling fact of the entire controversy, i.e., the drainage and confiscation of vast quantities of Petitioners' gas by Respondents from the gas field as to which Petitioners have been convicted of a Section 2 Sherman Act monopoly.

6. Whether the trial court in the second trial committed irremediable error and violated Rule 49 of the Federal Rules of Civil Procedure in instructing the jury that if they found Petitioners combined to file state court lawsuits against Defendants in bad faith and for harassment, such would be unlawful; because such instruction strips Petitioners of the protection of the *Noerr* and *Pennington* rules of this Court when the trial judge at the first trial had made an unreversed finding that such actions were filed in good faith and when no issue of antitrust law violation was submitted to or permitted to be passed upon by the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Plaintiffs-Respondents brought this action under Sections 1 and 2 of the Sherman Act 15, U.S.C. §§ 1 and 2;

Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *"

Section 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *"

and Section 4 of the Clayton Act, 15 U.S.C. § 15;

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and in the cost of suit, including a reasonable attorney's fee."

Other provisions and statutes involved are Section 4B of the Clayton Act, 15 U.S.C. § 15b:

> "Any action to enforce any cause of action under Section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued;"

and Art. 6008, Tex. Rev. Civ. Stat. Ann., governing regulation of production of natural gas by the Railroad Commission of Texas, pertinent provisions of which are separately published in the separate Appendix filed herewith at p. 180.

Also involved is that part of Amendment V of the Constitution of the United States providing:

> "No person * * * shall be deprived of life, liberty, or property, without due process of law * * *."

Petitioners-Defendants also have invoked Amendment VII to the Constitution of the United States providing:

> "In Suits of Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the Common Law."

STATEMENT OF THE CASE

Review is sought of two separate judgments rendered for the respondents as plaintiffs on the basis of two separate jury verdicts returned in two separate jury trials on what was held to be a single antitrust treble damage cause of action.* The second jury was told twice by the judge and

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* Petitioners here and defendants below are Aluminum Company of America (Alcoa), Lavaca Pipeline Company (Alcoa's wholly owned subsidiary), and Crown Central Petroleum Corporation (Crown). Respondents here and plaintiffs below are Stanley C. Woods and two corporations owned by Woods and his wife — Woods Exploration & Producing Co. Inc. and Southeastern Pipeline Company.

repeatedly by Respondents' counsel of the first jury's verdict against Alcoa, et al, the Petitioners. However, there was concealed from both juries the most salient and probative evidence in existence on the Section 2 Sherman Act monopoly of which Petitioners, Alcoa, et al, were convicted — the drainage and expropriation from them by Respondents, Woods, et al, of enormous quantities of Petitioners' gas from the very Appling Gas Field in Jackson County, Texas, which was held to be the subject matter of Petitioners' monopoly.

In the first of these cases, after Court of Appeals reversal of initial judgment for defendants Alcoa et al, judgment for treble the amount of damages found in the verdict, or a total of $429,777.00, was rendered by the second trial judge for the Respondent gas drainers against the Petitioners whose gas was drained. In the second trial in which the first trial verdict was perpetually paraded by judge and counsel alike before the jury, judgment was entered for treble the amount of the damages found in the verdict for $1,056,669.12 plus interest and plus $300,000.00 in attorneys' fees — again in favor of the gas confiscators against those whose gas was confiscated.

The litigation essentially involves the long-standing legal controversy between large-tract and small-tract owners as to their fair share of oil or gas production from common reservoirs. *See Hardwicke* and *Woodward, Fair Share and the Small Tract in Texas*, 41 Texas L. Rev. 75, in which the authors at 76 summarize the basic law as follows:

> "The Supreme Court of Texas in two recent cases, the *Atlantic* and *Halbouty* cases, held that the Commission, after establishing an allowable for a pool under the oil and gas conservation statutes, must distribute the allowable among the owners of the tracts on which producing wells are located so that each such owner

> is given a reasonable opportunity to produce the recoverable oil and gas in and under his tract or its equivalent in kind. In short, he is to receive his fair share. The Court pointed out that, if one or more owners are given allowables that permit them to produce more than their fair shares, the excess must necessarily be drained from the tracts of those who are denied such opportunity. Since this results in a taking or a confiscation of their property, such an allocation order is invalid."

In reliance on these cases, the Petitioners sought, through the Railroad Commission of Texas, the regulatory agency which has pervasive regulatory authority over controlling drilling for and production of oil and gas in Texas, to prevent the Respondents, Woods, et al, who had drilled numerous gas wells on town lots substantially after the drilling and production of gas wells on 320 acre spacing on leases covering more than 6,000 acres by Petitioners, Alcoa, et al, to prevent the drainage and confiscation of their gas by Respondents and to prevent Respondents from obtaining more than their "fair share" of the gas from the common reservoirs. From this resulted the antitrust treble damage action in which the two judgments of which review is sought were rendered.

Respondents Woods initially filed this antitrust treble damage action complaining solely of alleged combination between the Petitioners, lessees of large tracts, on which they had discovered various gas reservoirs from which they were producing gas primarily for fuel for an aluminum plant, to restrict the production of gas from these same reservoirs by Respondents and other lessees of town lots on which they had drilled gas wells through which they were draining large quantities of gas underlying the leases of Petitioners. It was averred that this combination, alleged to be violative of both Section 1 and Section 2 of the Sher-

man Act, was carried out by means of Petitioners filing greatly understated estimates of market demand for gas from the field with the Texas Railroad Commission, the regulatory body with statutory power to make allocations of the amounts of gas to be produced from the gas field and the various wells therein. The trial court granted partial summary judgment against Respondents under authority of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 438 F.2d 1286, *supra.*

Respondents as Plaintiffs were thereafter permitted to amend their complaint and to allege for the first time far more than four years after the alleged occurences that violations of Sections 1 and 2 of the Sherman Act consisted of Defendants' combining and conspiring to prevent Plaintiffs-Respondents from transporting their gas and from extracting the liquids therefrom by restraining them from using existing pipelines and requiring them to build their own pipeline at their own expense and by restraining them from building the liquid extraction plant. On the first trial of the case, the trial court excluded the proposed liquid extraction plant from the consideration of the jury as being too remote and too speculative but permitted the case to go to the jury with evidence as to the cost of the construction of the pipeline. The jury found that Petitioners did not conspire to restrain trade in violation of Section 1, but that they did monopolize, or conspire or attempt to monopolize in violation of Section 2, and found damages based upon the cost of the construction by Respondents of their own pipeline. The first trial court granted judgment notwithstanding the verdict in favor of Petitioners. The trial court held that the competition between Petitioners and

Respondents for gas from the common reservoirs conducted under the pervasive regulation of the Railroad Commission of Texas simply did not constitute sufficient evidence of a violation of Section 2 of the Sherman Act to submit to the jury. *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 304 F. Supp. 845 (S. D. Tex. 1969) App. 25.

The Court of Appeals reversed both judgments of the trial court and remanded the entire case. In so doing, the Court of Appeals denied Alcoa's plea that the Section 2 Sherman Act violations alleged in connection with the pipeline and the extraction plant were barred by the applicable four-year statute of limitations provision contained in Section 4(b) of the Clayton Act, 15 U.S.C.A. § 15, because the Court of Appeals held that the suit was on a single cause of action based on a conspiracy concerning the production, transportation and sale of gas from the Appling Field and that hence the allegations in an amended complaint concerning the pipeline and the liquid extraction plant, though made far more than four years after the occurrence of the events, related back to the original filing of the suit. *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 438 F.2d 1286, 1299-1300 (5th Cir. 1971) App. 38, 60-61.

The new trial judge, Retired Supreme Court Justice Clark, despite the fact that the Court of Appeals had held the case to be upon a single cause of action in order to avoid the limitations bar of Section 4(b) of the Clayton Act, nevertheless entered partial final judgment on the reinstated jury verdict for $429,777.00, three times the amount of damages found by the jury, and treated these damages as relating to the pipeline segment of the case only. He then ordered the case to proceed to trial before

another jury upon the alleged false forecasts of market demand to the Railroad Commission of Texas by Petitioners and the alleged frustration by Petitioners of the erection by Respondents of a liquid extraction plant. Respondents thereupon abandoned the alleged false forecasts segment of the case, which was all the lawsuit was about for more than four years after it was first filed and until after the first trial court had granted partial summary judgment on this issue. The new trial judge then ordered the case to proceed to trial before a new jury on the liquid extraction plant splinter of the case alone, despite Petitioners' protests that under the holding of the Court of Appeals on the Section 4(b) limitations issue, the case on one cause of action could not be fragmented into three separate splinters and a partial final judgment entered on one of them under the strictures of Rule 54(b) of the Federal Rules of Civil Procedure which authorizes such only "when more than one claim for relief is presented in an action."

Furthermore, the new trial judge not only refused to retry the entire case as Petitioners insisted the fact that it was held to be upon a single cause of action necessitated, but, indeed, refused to try liability or antitrust law violation issues at all as to the extraction plant sliver to which the case had now been chiseled down. Instead, the trial judge held that the first jury had established a Section 2 Sherman Act violation embracing the extraction plant as a matter of law and so instructed the jury both on its impanelling and upon final charge to it, in which instances the entire prior jury verdict adverse to the Petitioners was read by the judge to the jurors. This action was taken despite the fact that the extraction plant issue was never submitted to but was expressly excluded from the consideration of the jury by the trial judge at the first trial

and was never before the first jury on the issue of antitrust law violation or otherwise, and despite the fact that the Section 2 violation found by the jury in the first trial was expressly restricted to the "drilling for, producing, and transporting gas from the Appling Field" by the issues submitted to the jury upon which it made its Section 2 violation finding. The extraction plant had not only been excluded from evidence and expressly excluded from the jury's consideration by the instructions of the judge at the first trial, but "extraction" was specifically excluded from the Section 2 violation issue submitted to and found by the jury.

Following the precedent of the first jury verdict, twice read to them by the judge, and extensively argued by counsel for Respondents, the second jury also returned a verdict adverse to Petitioners with damages predicated upon the extraction plant upon which the trial judge entered a second and separate judgment for $1,056,669.12, treble the amount of damages found by the jury from the alleged frustration of the construction of the liquid extraction plant, together with interest and $300,000.00 in attorneys' fees.

In the trial before the second jury, although the trial court had excluded antitrust violations issues from the case and had treated the jury verdict in the prior trial as establishing them as a matter of law in the second trial, he nevertheless instructed the jury in Instruction No. 32 with reference to evidence that Alcoa, et al had filed various state court suits against Respondents in connection with seeking to prevent them from getting permits to drill gas wells on town lots:

> "You are instructed, however, that persons, including corporations, may not combine for the purpose of using governmental agencies and the courts as a means

to harass and deter competitors in furtherance of their monopoly. Acts which are in themselves legal lose their character when they become constituent elements of an unlawful scheme."

This highly prejudicial and inflammatory instruction was objected to by Petitioners, because it could not possibly be included within the authorization to give "to the jury such explanation and instruction concerning the matters thus submitted as may be necessary to enable the jury to make its findings upon each issue" as provided in Federal Rules of Civil Procedure No. 49 for cases submitted to the jury by the special verdict method.

Petitioners took separate appeals from the two separate judgments. Original submission of the appeal from the first judgment was set aside following discovery in oral argument that an appeal from a second judgment in the same case was on the way to the Court of Appeals. The two appeals were ordered consolidated and were argued together. After more than fifteen months following this second submission, the Court of Appeals handed down an opinion and decision, App. 107, affirming both judgments largely on the grounds that they were necessitated by the first opinion by the Court of Appeals in the original appeal, *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), App. 38, which had in effect become "the law of the case." Petition for Rehearing En Banc was filed and denied. App. 129.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals warrants review on certiorari for several reasons:

I. The action of the trial court in twice reading to the second jury the adverse verdict of the first jury and in permitting counsel for Respondents to argue

extensively concerning it was so highly improper, inflammatory and unprecedented as to require correction and, indeed, it amounted to a denial to Petitioners of that fair trial and due process of law guaranteed them by Amendment V to the Constitution of the United States.

II. The fragmentation of what had already been determined to be a single antitrust cause of action into three parts, with a partial final judgment being entered in one amount on one jury verdict, and a second judgment being entered in another amount on a second jury verdict, without there ever being a trial of the entire case, constituted such an unprecedented violation of Rule 54(b) of the Federal Rules of Civil Procedure as to require correction and, indeed, amounted to a denial to Petitioners of that fair trial of a single antitrust cause of action guaranteed to them by the Fifth Amendment to the Constitution of the United States. Further, the first jury's findings of antitrust violation being treated as binding as a matter of law upon the second jury before which a trial of liability or antitrust violation issues was denied, constituted such a highly improper and unprecedented procedure as to require correction and, indeed, constituted a denial to Petitioners of that due process of law guaranteed by the Fifth Amendment. It further denied that jury trial guaranteed by the Seventh Amendment to the United States Constitution when a separate judgment was entered on the second jury verdict without there ever having been a jury trial or a jury determination as to the antitrust law violation involved in that segment of the fragmented case, which had been expressly excluded from and not submitted to the first jury, and hence not passed upon by it.

III. The exclusion at both jury trials of two splinters of a single antitrust cause of action of the most probative evidence on the issue of Section 2 Sherman Act monopoly upon which both judgments are based through denial to Petitioners of the development of evidence before either jury of the drainage and expropriation of vast amounts of Petitioners' gas by Respondents from the gas field constituting the subject of the alleged Section 2 monopoly constituted such grossly improper trial procedure as to require correction and, indeed, amounted to a denial to Petitioners of that fair trial and that due process of law guaranteed by the Fifth Amendment and that jury trial of the entire case guaranteed to Petitioners by the Seventh Amendment to the United States Constitution.

IV. The trial court's instruction to the jury that the filing of various state court cases by Petitioners against Respondents could be unlawful constituted such a gross impropriety under Rule 49 of the Federal Rules of Civil Procedure governing instructions in cases submitted on special verdicts as to require correction when no issue of antitrust violation was permitted by the court to be tried by the second jury; when there had been an undisturbed finding at the first trial that such state court actions were filed in good faith; and when the instruction was an incorrect statement of the law in any event.

ARGUMENT

I.

The Exploitation of the First Jury Verdict by Both Trial Court and Counsel Before the Second

Jury Was So Highly Inflammatory, Improper and Prejudicial as to Require Review.

In its Memorandum Opinion, the second trial court in fact offered no explanation for its unprecedented and utterly devastating action of stressing the first jury's verdict to the second jury except to state that it had done so and that because Petitioners objected to its reading a part of the first jury's verdict again in its final jury charge that it resolved this issue by reading all of it. The trial court stated:

> "On voir dire at the time of the selection of the jury, the court read to the panel the verdict of the jury at the first trial and advised them of the nature of the case, the respective claims of the parties and their duties as jurors to take the law of the case from the Court and that full and detailed instructions would be given them before they received the case. * * * The Court, in the first draft of the charge, summarized the jury finding at the first trial concerning Defendants' monopolization of the extraction of gas from Appling Field. When the Defendants objected that the characterization was not full and complete, the Court then incorporated the whole verdict in the charge. The Defendants then objected to the whole charge being read. *The case was submitted on the theory that the monopolization charge had been established at the prior trial.*" (Emphasis supplied). (Court of Appeals Appendix, No. 73-1633, Pg. 103).[1]

The opinion of the Court of Appeals is equally devoid of any statement of substantial justification for repeatedly waving the first jury's adverse verdict in the face of the

[1] Request will be duly made to the clerk of the Fifth Circuit Court to certify and transmit the printed Appendix of the Record in that Court to this Court.

second jury. It simply swept this shabby and shocking procedure deftly under the rug with the following total comment:

> "In this connection, it was not error to instruct the jury as to the verdict reached by the first jury in the original trial of case on the monopolization issue. It was necessary for the jury in the second trial to be informed of the outcome of the prior litigation, since the resolution of the issue before it presumed the earlier findings. The claim that such instruction was error is without merit."

This amazing statement is totally devoid of any support in either reason or authority. No judicial precedent is cited by the trial court or by the Court of Appeals sustaining this highly inflammatory action, because we confidently state that there is none. All discovered judicial expressions on the subject are exactly to the contrary.

There is one situation in which there is express statutory authority for using a verdict and judgment in a prior trial. Section 5 of the Clayton Act permits, under certain circumstances, prior Government judgments to be admitted in evidence in subsequent private suits as prima facie proof of certain issues. Even in those cases where there is express statutory authority for showing a prior verdict and judgment, it is well settled that the verdict may not be utilized where there is no final unappealable judgment. That was precisely the situation in the present case. At the time that the prior verdict was being flaunted before the second jury throughout the second trial, its validity was under attack in an appeal pending in the Court of Appeals and, accordingly, was not final.

The very reason assigned by the trial judge in the second jury trial here to permit the prior verdict to be shown

because it would be helpful to the jury as "background" and in giving them the flavor of the case, (Trial Record 527) was expressly condemned in *International Shoe Machinery Corp.* v. *United States Shoe Machinery Corp.*, 315 F.2d 449 (1st Cir.) *cert. denied*, 375 U.S. 1963. There the Plaintiff's attempt to introduce the prior Government judgment that was not final was excluded, because the court said that in weighing its "probative value" against its "capacity for prejudice," it had to be concluded that its "prejudice quotient" was so high that it outweighed "its legitimate effect" because:

> "Whether admitted purely as 'background' evidence or not, evidence of a judicial determination of prior illegal conduct on the part of the Defendant cannot help but have a great emotive impact on the jury.
>
> As Wigmore states:
>
> 'The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with any jury in or out of court.'"

The cases are uniform that even a prior Government judgment cannot be utilized under the limited circumstances of Section 5 of the Clayton Act unless the judgment is final.[2]

Since a prior Government judgment and Section 5 of the Clayton Act was not involved and could not even be

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[2] *See Russ Togs, Inc.* v. *Grinnel Corp.*, 426 F.2d 850 (2d Cir. 1970); *Fifth and Walnut* v. *Loew's, Inc.*, 176 F.2d 587 (2d Cir. 1949); *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 133 F.Supp. 839, 845 (S.D.N.Y. 1955); *De Luxe Theatre Corp.* v. *Balaban & Katz Corp.*, 88 F.Supp. 311 (N.D. Ill. 1950); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F.Supp. 366, 369 (D. Minn. 1939).

relied upon here, it is simply elementary and undisputed that "upon a subsequent trial of a case, it is improper for counsel to disclose to the jury the decision made at a former trial." *Glens Falls Insurance Company* v. *Yarborough*, 396 S.W.2d 200 (Tex. Civ. App. — Waco 1965, writ ref'd n.r.e.); *Looney* v. *Traders and General Ins. Co.*, 231 S.W.2d 735, 737 (Tex. Civ. App. — Fort Worth 1950, writ ref'd n.r.e.).

Even if the trial court in the second trial had been correct in his assumption and instruction to the jury that Alcoa, et al were bound by the prior finding against them of monopolization, as will later be shown to be incorrect, it would, nevertheless, have been totally unnecessary and serve nothing but a purely prejudicial and inflammatory purpose to reveal to the second jury the details of the first jury's verdict and to flaunt it before them repeatedly from both the Bench and the Bar. The jury need only to have been instructed that such a monopolization existed and that they were to so assume in their deliberations, and that they were merely to determine whether Woods was prepared to construct an extraction plant and whether, as a part of Alcoa's monopoly and in furtherance thereof, it prevented its construction. Even Woods' counsel recognized this fact as early as a Pre-trial Conference of February 17, 1972, when asked "what to tell the jury with reference to the prior trial if we tell them anything." Counsel's answer then was:

> "MR. ABLE: Don't need to say a thing. If you do, put it in your instructions that the question of liability has already been decided in a previous trial and you're merely called upon to find the answer to the following issues." (Court of Appeals Appendix No. 73-1633, p. 176)

Justice Clark later recognized at a Pre-trial Conference of October 30, 1972, that even this restricted and guarded

handling of the matter would be irretrievably and incurably injurious, stating then:

> "if you said, as you did evidently think I should, that these Defendants have been found liable on a claim of monopoly, *which would be as light a way as I could put it*, if that was error, why, *that would be so damaging that we wouldn't be able to retrieve it.*" (Court of Appeals Appendix No. 73-1633, p. 199)

Thereafter, instead of handling it in "as light a way," as he "could put it," the trial judge instead read the prior verdict in its entirety to the jury on the voir dire examination, set it out again in its entirety at the very beginning of his charge to the jury (Court of Appeals Appendix No. 73-1633, pp. 77-81); repeatedly told the jury that there was a "monopoly heretofore found to exist to monopolize the trade and commerce of drilling for, producing and transporting gas from the Appling Field" (App., *supra* 82, 83, 88, 90, 96); and permitted the jury to take the written charge containing the full text of the prior jury verdict to the jury room with them and to have access to it throughout their deliberations on the second verdict.

In addition to repeated emphasis on the prior verdict by the trial court, who actually admitted the prior verdict before the second jury for all purposes (Court of Appeals Record, 73-1633, pp. 2174-78, 3811-3816), the judge permitted Woods' counsel to flaunt the prior verdict before the second jury repeatedly and without any restraint (Court of Appeals Record, 73-1633, pp. 4027, 4045-46, 4123, 4129-30, 4139-40).

In essence, the jury was told in every possible way that they should do the same thing to Alcoa, et al as the prior jury had done — that the first jury had made a good start, and that they should finish the job. With this flagrant misuse made of the prior jury's verdict, Petitioners did not

have a remote chance of receiving that fair trial and that due process of law guaranteed to them by Amendment V to the Constitution of the United States, but instead, there was a complete preview of things to come in the trial court's prophetic if indelicate reference to the old Chinese proverb suggesting to counsel for Petitioners during a pre-trial discussion of this issue on October 30, 1972, that he simply "relax and enjoy it." (Court of Appeals Appendix 73-1633, p. 201) All of this was done to Petitioners despite their most desperate efforts to avoid it by Motion in Limine, by extended argument at Pre-trial Conference, by repeated objections during the trial, and by extensive objections to the trial court's charge to the jury on the issue. Petitioners have been stripped of any protection from the most invidious and insidious kind of prejudice unless that protection now be accorded by the Supreme Court of the United States.

II.

Fragmentation of a Single Cause of Action Into Separate Parts With Two Separate Judgments For Two Separate Penal Amounts Predicated Upon Two Separate Jury Verdicts is Impermissible Under Rule 54(b) of the Federal Rules of Civil Procedure or Otherwise.

The Section 2 Sherman Act amended complaint complaining about the alleged frustration of use of the Lumar pipeline and participation in construction of the Lumar extraction plant admittedly occurred long after the expiration of four years following the claimed occurrence of these events. Nevertheless, the Court of Appeals in *Woods Exploration & Producing Co.* v. *Aluminum Co. of America, supra,* at 438 F.2d 1286, 1300, held that the four-year limitations bar contained in 15 U.S.C.A. § 15(b) did not apply,

because these events referred to "the same transaction or occurrence." In other words, they were held to be a part of the same and single cause of action because 15 U.S.C.A. § 15(b) specifically requires that:

> "Any action *to enforce any cause of action* under § 15 or § 15(a) of this title shall be forever barred unless commenced within four years *after the cause of action accrued.*" (emphasis supplied)

Only because the Section 2 complaint about the pipeline and the extraction plant was held a part of the same "cause of Action" as the original Section 1 Sherman Act complaint about the alleged false market demand forecast to the Railroad Commission of Texas could they escape the mandatory four-year limitations bar of 15 U.S.C.A. § 15(b).

When the pipeline segment of the case was held to be a part of the same cause of action as the false market demand forecast segment originally sued upon, it could not, as a matter of law, be made the basis of a separate partial final judgment under governing Rule 54(b) of the Federal Rules of Civil Procedure which expressly limits partial final judgments as here involved to situations "When more than one claim for relief is presented in an action, * * * the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * * ." It is judicially settled that "more than one claim" means more than one "cause of action under common law pleading." *King* v. *California Co.*, 236 F.2d 413, 414 (5th Cir. 1956); *Gottesman* v. *General Motors Corp.*, 401 F.2d 510, 512 (2nd Cir. 1968); *Cott Beverage Corp.* v. *Canada Dry Gingerale, Inc.*, 243 F.2d 795 (2nd Cir. 1957); *Rieser* v. *Baltimore & Ohio R.R. Co.*, 224 F.2d 198, 199.

The trial judge at the second trial expressly recognized that under the Court of Appeals holding there was necessarily only a single cause of action, stating that he had

entered partial final judgment for the pipeline damages only based on the first jury verdict "not thinking that there would be three different causes of action, because I think you are right on that, because if we say it is three different causes of action, why, certainly limitations would bar the extraction of liquids." (Court of Appeals Appendix 73-1633, p. 193-194) The trial judge merely gave the judicial shrug to Rule 54(b)'s strict confinement of partial final judgments to one or more of multiple causes of action sued upon on the ground that the Court of Appeals at 438 F.2d 1316 had inserted a dictum that "the trial court may, if it wishes, render a partial final judgment under Fed. R. Civ.P. 54." This reasoning ignored the fact that the Court of Appeals did not mandate the entry of a partial final judgment in its dictum and that when the Supreme Court denied Petition for Certiorari in that case, no such partial final judgment had in fact been entered.

The truth is inescapable that Rule 54 does not permit, but expressly precludes, the entry of a partial final judgment on a splinter of an admittedly single cause of action as was done here. The resulting anachronism of two separate judgments for two separate amounts of damages based upon two separate jury verdicts on a single cause of action not only contravenes Rule 54, but violates proper judicial administration in a very fundamental way and should be corrected by the Supreme Court of the United States.

The maladministration of this particular case is underscored by the fact that the second trial court, after entering partial final judgment on the first verdict, bound Petitioners Alcoa, et al in the second trial on the extraction plant splinter of the case by the Section 2 Sherman Act monopolization finding made in the first case as to the pipeline segment. Retrial of the liability issue of anti-trust

violation was strictly prohibited in the second case. The jury was told instead that the Petitioners came into the case as convicted law violators, and that they were to judge them accordingly. This amazing judicial course was taken despite all of the following:

(1) The Court of Appeals expressly stated on Petition for Rehearing following the first trial, the following:

> "Appellees' argument to the contrary notwithstanding, we think our opinion clearly states that the trial on remand with regard to the alleged filing of false nomination forecasts *shall encompass all those issues which are associated with antitrust actions.*" (Emphasis Supplied). Appendix 96.

No reason, rational or otherwise, has been advanced as to why a trial on "false nomination forecasts" would "encompass all those issues which are associated with antitrust actions," but a trial on the liquid extraction plant would not. Neither the false nominations issue nor the liquid extraction plant issue was ever heard by, submitted to or passed upon by the jury at the first trial. The evidence as to both was excluded at the first trial, and the jury was expressly instructed not to consider the liquid extraction plant for any purpose.

(2) The second trial judge expressly recognized at the Pre-trial Conference of May 31, 1972 that the extraction plant issue was totally excluded and simply was not tried in any part at the first trial, Justice Clark stating with reference to Judge Singleton's charge at the first trial:

> "It says that you are instructed that the matter of the proposed gas extraction plant on the Lumar Gas Corporation pipeline, or any proposed interest of the Plantiffs, or any one of them, have been excluded from the case and you shall not consider nor give any weight

whatsoever to any testimony or evidence relating to this matter, nor consider it in any way in connection with the deliberation of damages.

Damages is just part of it. He has got a very broad statement there that appears to carve out, to me — particularly since your citation doesn't have any reference to the pipeline — to the extraction plant — it seems to carve out the extraction plant.

MR. ABLE: Well, you may be right, Your Honor." (Court of Appeals Appendix 73-1633, p.186)

(3) It is undisputed that the first trial court not only, by specific instruction quoted by the second trial judge above, excluded the extraction plant from any consideration by the jury, but that no issue of Section 2 Sherman Act conspiracy covering a liquid extraction plant was submitted to or found by the jury. The issue submitted to and the finding made by the first trial jury on Section 2 Sherman Act monopoly were as follows:

"Question No. 2

Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any of them, or either of them, to monopolize any appreciable part of the trade and commerce of *drilling for, producing, and transporting gas from the Appling Field?* (Emphasis Supplied)

Answer: Yes."[3]

(4) Both the second trial judge and counsel for Woods initially recognized at the Pre-trial Conference of May 31, 1972 that there had been no jury finding of monopoly as to extraction at the first trial as demonstrated by the following colloquy between Court and counsel:

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[3] The complete jury verdicts in both the first and second trials are reproduced as a Supplement at the end of this Petition.

"MR. MANDELL: The jury finding does not have the extraction plant.

THE COURT: No.

MR. MANDELL: No, sir.

THE COURT: Since that is taken out —

MR. MANDELL: That's correct, it was taken out.

THE COURT: How did they pass on it, then?

MR. MANDELL: But they did find a monopoly.

THE COURT: Not on extraction.

MR. MANDELL: No, sir, not on the extraction.

THE COURT: Well, that's all that is involved here is the extraction."

(Court of Appeals Appendix 73-1633, p. 189)

The second trial judge thereafter reversed himself and took the view that the submission of "transportation" of gas to the jury could also have included "extraction of liquids." How could either Justice Clark, as the second trial judge, or Judge Simpson, writing the opinion for the Court of Appeals of which review is sought, possibly reason that Section 2 antitrust conspiracy had been adjudicated as to extraction of liquids in the first trial when the first trial judge not only excluded all evidence as to the extraction plant, expressly instructed the jury that they were not to consider the extraction plant for any purpose but specifically omitted "extraction of liquids" from the issue submitted to the jury on "drilling for, producing and transporting gas?" Both simply gave it the judicial brushoff on the finding that the first Court of Appeals opinion had "remanded for retrial only on the issue of damages flowing from the interference with the proposed extraction plant." App. 112. The Court of Appeals opinion states again:

> "The issue on remand was properly limited to the issue of damages flowing from the Alcoa Appellants' alleged interference with the construction of the liquids extraction plant through their concerted activity." (App. 121).

(5) Both Justice Clark and Justice Simpson in effect simply treat this as the "law of the case" flowing from the first Court of Appeals' opinion. They do so in the teeth of the clear, uncontroverted record that the extraction plant evidence and issue were never submitted to nor passed upon by the first jury. Judge Singleton at the Pre-trial Conference of February 17, 1972 concluded "I still have to try the issue of monopoly or monopolization," (Court of Appeals Appendix, *supra*, 176) and Justice Clark initially agreed at the Pre-trial Conference of May 31, 1972. (Court of Appeals Appendix, *supra*, 186, 189-190). He put it most plainly at p. 191 when he said: (referring to Judge Singleton) "Since he took it away from them and since there is no finding on it, I just can't see how we can assume there is a finding."

At 192 he stated: "It is a non sequitur, it apears to me, to tell the jury that they have already been found guilty of monopoly in production and transportation and you are to find whether, as a result of that, that monopoly in transportation and production of extraction has been prevented."

> "MR. MANDELL: That's correct, Your Honor.
>
> THE COURT: That's an entirely different problem than the other. It doesn't look like to me, unless you are going to say there was one over-all conspiracy in which this was a facet or an overt act, of course, you could try it on that basis and say that, but then, *you run into the problem that the jury didn't pass on the extraction.*" (Emphasis Supplied)

It is manifestly clear on any fair view of this record that Petitioners have never had their day in court on an antitrust liability issue — on a Section 2 Sherman Act monopolization issue — related to the extraction of liquids from the natural gas through an extraction plant. They have never introduced their evidence, been heard on or had a jury consideration or finding on that issue. Yet, a second

and separate judgment for $1,056,669.12 plus interest and $300,000.00 in attorneys' fees has been rendered against them upon it. They have been denied that due process of law guaranteed to them by the Fifth Amendment to the Constitution of the United States and that jury trial of the antitrust violation and liability issues as to the extraction plant guaranteed to them by Amendment VII to the Constitution of the United States.

III.

Petitioners Have Been Denied Development At Either Jury Trial of the Most Probative Evidence on Antitrust Monopolization and Damages in the Form of Proof of Drainage of Vast Quantities of Their Gas by Respondents.

At the first trial, Alcoa, et al were denied all their tenders of evidence on the uncontroverted fact that Woods had continuously drained vast quantities of Alcoa's gas from underneath Alcoa's leases on the theory that this evidence related only to the alleged false market demand forecasts as to which the trial court had granted summary judgment for the Defendants. When the case came on for trial after remand, Woods totally abandoned this part of his lawsuit, which was all that it was about during the first four to five years of its pendency, for the obvious tactical purpose of seeking to exclude the drainage evidence at the second trial. Justice Clark dismissed this phase of the case with prejudice, (Court of Appeals Appendix, *supra*, 1) although he expressed the view at the May 31, 1972 Pre-trial Conference that it was "somewhat fantastic" that while the Supreme Court of Texas would hold that while Woods was guilty of drainage of Aloca's gas which was not their property, "still there is no right" (Court of

Appeals Appendix, *supra*, 185). Justice Clark nevertheless excluded any substantial development of this evidence at the trial. Hence, the trial upon which the second judgment was based was one in which Defendants' exhibits 48-50, 53-69, which fully developed the facts of the vast amount of drainage of Alcoa's gas by Woods and the production of more gas from Appling Field, the subject matter of the alleged antitrust monopoly, by Woods and his counterparts than by Alcoa, were excluded.

At the trial on which the first partial final judgment was entered, the court excluded undisputed facts previously found by the Texas Supreme Court in two decisions involving the same parties and the same basic transactions and controversies as are involved here. In the first, *Railroad Commission* v. *Aluminum Co. of America*, 380 S.W.2d 599 (Tex. 1964), App. 164 the Texas Supreme Court found that the allegations that the orders of the Railroad Commission of Texas "permits enormous drainage to town lot and other small-tract wells from under Respondents' lands" and "that the average per-well allowable for the small tracts is forty-three times the average per-acre allowable for standard unit tracts," constitute "allegations which are proven without substantial dispute." The court had previously held the one-third — two-thirds allocation formula utilized by the Railroad Commission of Texas bringing about such results to be confiscatory and invalid in the cases of *Atlantic Refining Co.* v. *Railroad Commission of Texas*, 346 S.W.2d 801 (Tex. 1961), and *Railroad Commission of Texas* v. *Shell Oil Co.*, 380 S.W.2d 556 (Tex. 1964), but it held that Alcoa could not take advantage of the fact that the formula was confiscatory and invalid in its case also, because it had been guilty of *laches* in attacking the validity of the formula.

The Texas Supreme Court had also held in *Railroad Commission* v. *Woods Exploration & Producing Co.*, 405 S.W.2d 313 (Tex. 1966), again found in this same controversy between these same parties involving this same gas field, that another Railroad Commission of Texas regulation, Statewide Rule 31, resulted as follows:

> "This enabled the latter to produce far more of the reservoir allowable than their share as determined by the basic one-third — two-thirds allocation formula, and the drainage advantage which the small-tract operators already enjoyed by virtue of the formula itself was thus substantially enhanced." (App. 134).

The introduction of these Supreme Court opinions and the development of the underlying facts upon which they were based were all excluded at the first trial upon which the first judgment is based, although this evidence obviously constituted the most probative evidence in existence on whether Alcoa, et al, were guilty of a Section 2 Sherman Act monopoly violation as to the Appling Field, from which Alcoa's gas was being drained by Woods and the other town lot operators, in quantities greater than Alcoa was able to produce therefrom, as well as to the issue of damages.

Accordingly, Alcoa, et al are in the grim and ghastly position of having two separate heavy antitrust penalty judgments imposed upon them at two separate trials before two separate juries without having been permitted at either trial to develop the most probative, salient and persuasive evidence in existence on the governing liability issue, i.e., that the Woods Respondents over a long period of time, had drained and confiscated vast quantities of their gas from under their lands in a manner which would be unlawful but for *laches* and, in fact, had been able to produce more gas from the gas field which was the subject matter of

the alleged monopoly than had Alcoa and its Co-defendants. There glares out of the record the fact that the Petitioners have been, despite two jury verdicts and two judgments, denied any one jury trial in which they were permitted to try their whole case and develop their whole most probative and persuasive evidence. Judgments imposed under these circumstances constitute a denial of fair trial and due process of law under Amendment V and the denial of that full jury trial to which Petitioners are entitled under Amendment VII to the Constitution of the United States.

IV.

The Second Trial Court Violated Both Federal Rule of Civil Procedure 49 and Fundamental Fairness in its Special Jury Instruction on State Court Lawsuits Filed by Petitioners Against Respondents.

At the second trial, the jury was told over Petitioners' objections as a part of Instruction 32 of the charge of the court dealing with certain state court lawsuits filed by Petitioners against Respondents, in part, as follows:

> "You are instructed that under the Antitrust laws, individual action taken by Defendants before the Railroad Commission of Texas and in the courts cannot be considered as evidence against them. A person individually is privileged under the United States Constitution to take any and all such action. *You are instructed, however, that persons, including corporations, may not combine for the purpose of using Governmental agencies and the courts as a means to harass and deter competitors in furtherance of their monopoly. Acts which are in themselves legal lose their character when they become constituent elements of an unlawful scheme.*" (Emphasis Supplied) (Court of Appeals Appendix, *supra*, 95).

This instruction was given despite the fact that the trial court had already twice put the previous jury verdict convicting Petitioners of Section 2 Sherman Act monopoly before the jury and had charged them that the Petitioners in the second case were bound by the finding of monopolization in the first case and despite the fact that the trial court refused to submit any antitrust law violation issue to the second jury at all. Hence, on its face and in the most irremediably harmful way, the instruction violated Federal Rule of Civil Procedure 49 which limits the judge, when a case is submitted by the special verdict method as this one was, to giving "to the jury such explanation and instruction concerning the matters submitted as may be necessary to enable the jury to make its findings upon each issue."

The instruction complained about was further grossly and patently erroneous because there had, up until the time that the charge was given, never been any pleading, proof or contention that the state court suits filed by Alcoa, et al against Woods, et al were filed in bad faith. Further, Woods never once contended that the suits had anything to do with frustrating the extraction plant. It was, of course, obviously necessary for Alcoa, et al, to file a separate suit on each new town lot well that was drilled, because a different lessor would be involved; and in order to preserve Petitioners' attack on dual completions, the one-third — two-thirds allocation formula and drainage by Respondents through well bore separations and otherwise, it was necessary that separate suits be filed against all separate parties in interest. Readily so recognizing, Judge Singleton had determined at the first trial that the motive for filing the lawsuits was not illegal and that on the contrary, there was "probable cause for the action." *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 284 F. Supp. 582, 594-96 (S.D. Tex. 1968), App. 23. Such findings were

not appealed by Woods, et al and became binding on the trial court at the second trial as the law of this case. *See D. C. Federation of Civic Assoc.* v. *Volpe,* 459 F.2d 1231, 1267 (D.C.Cir. 1972); *Smith* v. *Pittsburgh Gage and Supply Co.,* 323 F. Supp. 256 (W.D. Pa. 1971); *United States* v. *First National Bank and Trust Co.,* 263 F. Supp. 268 (E.D. Ky. 1967).

The second trial judge had himself at all times recognized that the suits were based on probable cause and were filed in good faith up until the very time that he gave the highly prejudicial instruction in issue. At the Pre-trial Conference of May 31, 1972, in speaking of the Texas Supreme Court decisions in this litigation, which were ultimately adverse to Petitioners, Justice Clark said:

> "I'm amazed that you weren't able to * * * redress it. I had always taken the position — I guess I am going to have to change some of my language — I had always taken the position where there was a wrong done, well, there had to be a remedy, and apparently, the Supreme Court held that this was not a wrong, I suppose; but certainly there was an injury and if you have an injury, why, it looks like you would have a remedy."

He further referred to the Texas Supreme Court decisions by saying:

> "The opinions do read somewhat fantastic in regard to holding that while this was drainage, it was not their property * * * why, still there is no right." (Court of Appeals Appendix, *supra,* 185).

Later, in the same hearing, he expressly agreed to a statement by Mr. Sterling of counsel for Petitioners "that no one can rightfully say that Alcoa and Crown were litigating a frivolous or harassment-type litigation, because we would win it in the Trial Court, and then, we would win it in the Court of Civil Appeals, and then, we would lose it in the

Supreme Court, so there are lots of Judges here in Texas thought there was something to our suit. We just kept missing with the last nine.

> THE COURT: Certainly was something to it, no question about that." (Court of Appeals Appendix, *supra*, 189).

Justice Clark excluded the complete pleadings and the details of the lawsuits when Petitioners sought to introduce them on the ground that it would be "encumbering the record" and that there was no issue as to the lawsuits being filed in good faith and ultimately admitted the pleadings in the lawsuits for the sole purpose of showing the filing dates thereon. Despite all of this background of his own making, and despite the fact that he was refusing to submit any issue of antitrust violation to the jury on the ground that such had already been determined and foreclosed by the first jury verdict— being the only issue to which such instruction could be in the least relevant, Justice Clark nevertheless, over Petitioners' strenuous objections, charged the jury that if Petitioners combined to file these lawsuits "to harass and deter competition in furtherance of their monopoly" that such lawsuits could "become constituent elements of an unlawful scheme."

Even if there was a special issue being submitted to the jury to which the instruction could be relevant, and even if the record background did not preclude any issue of bad faith filing of the lawsuits, the instruction was clearly contrary to the established law as declared by this court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). The Fifth Circuit has clearly itself since so recognized in its decision in *House-*

hold Goods Carriers' Bureau v. *Terrell,* 452 F.2d 152 (5th Cir. 1971).

Apparently, the trial court sought to justify the instruction under *California Motor Transport* v. *Trucking Unlimited,* 404 U.S. 508 (1972), which cannot be properly regarded as governing, because there was evidence and fact findings there that there was a combination to "harass and deter Respondents in their use of administrative and judicial proceedings so as to deny them — free and unlimited access — to these tribunals" and that in effect the tribunals were "effectively closed" to Respondents. On the contrary, the uncontroverted evidence in this case is that all tribunals have been completely accessible to the Woods Respondents and that, indeed, they have, up to now, uniformly prevailed in them. *See* the three Texas Supreme Court opinions published in the Appendix.

However, it is totally incredible that it would even be suggested that an issue of bad faith on the part of Petitioners in prosecuting this litigation could be said to exist on the record of this case to warrant the submission of the instruction and issue when, admittedly, Petitioners would have prevailed in their attack on the validity of the one-third — two-thirds allocation formula under the *Shell* and *Normanna* cases by the Texas Supreme Court, *supra,* except for the fact that they were held cut off by *laches* from attacking the formula. Surely, it cannot be rationally held that a combination to abuse the processes of the court by bad faith filings existed when Petitioners prevailed in the trial courts and in the intermediate appellate courts and when three of the nine justices dissented in the ultimate Supreme Court decision in 1966, Justice Hamilton stating in his dissenting opinion that:

> "The Court's opinion graphically sets out the mass confiscation of property and the gross injustice that results from the enforcement of Rule 31 prior to the amendment that is under attack here."

It is simply beyond any rational denial that the litigation pursued by Petitioners in the state court was merely in a good faith desperate effort to obtain their 'fair share' of the gas in the common reservoirs and to seek to reduce their continued pillage by the Respondents under the comprehensive regulatory scheme set up by the Texas statutes governing the drilling for and production and allocation of oil and gas. The instruction was simply, in any event, a gross violation of the basic principles of the *Noerr* and *Pennington* decisions.

V.

The Totality of the Second Trial Judge's Rulings Denied Petitioners a Fair Trial and Due Process of Law.

Reversing virtually all of his initial Pre-trial Conference positions, the second trial judge (1) entered a separate final judgment on a single segment of what had to be held a single cause of action in order to avoid the four-year limitations bar of Section 4(b) of the Clayton Act; (2) after fragmenting what had been held to be a single cause of action into three splinters, nevertheless, bound the Petitioners in the trial of the second or extraction plant segment of the single cause of action with the finding of unlawful Section 2 Sherman Act monopoly made by the first jury and refused to try liability or antitrust violation issues before the second jury; (3) totally without precedential support twice read the adverse jury verdict in the first

trial to the jury in the second trial and permitted counsel for Respondents to flaunt it before the second jury continuously; (4) though subjecting Petitioners to two separate judgments based on two separate jury verdicts and two separate trials of a single cause of action, nevertheless, prohibited Petitioners before either jury from developing the most probative and weighty evidence in existence on Section 2 Sherman Act conspiracy and on damages, i.e., the undisputed and adjudicated drainage and confiscation of vast amounts of Petitioners' gas by Respondents so that their total production from wells on a miniscule percentage of the total acreage exceeded that of Petitioners in the gas field of which Petitioners were held to have acquired a Section 2 Sherman Act monopoly; and (5) erroneously and with patently devastating damage to Petitioners, intructed the jury that the filing of state court lawsuits to protect their gas reserves from drainage and confiscation could constitute illegal antitrust violations by Petitioners though no issue of antitrust violation was being submitted to the jury and the jury was being charged, instead, that the Petitioners were guilty of a violation of the antitrust laws on the basis of the prior verdict and judgment which was not then even final. The totality of these rulings necessarily denied Petitioners that fair trial and that due process of law of their entire case as one lawsuit before one jury with all of the probative admissible evidence fairly and fully presented which is guaranteed to them by the Fifth and the Seventh Amendments to the Constitution of the United States.

The totality of the conduct of the second trial was clearly such as to convey unmistakably to the jury the opinion of the judge that the Petitioners are law violators and that the verdict should be returned against them.[4] In addition

[4] *United States* v. *Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963).

to the major grave errors already specified, the second trial judge excluded the highly relevant and material testimony of Ralph Queen, Petitioners' handwriting expert, and his supporting exhibits which would have been to the effect that the alleged contract between the Respondent Southeastern and Lumar, principally relied upon by Respondent at the first trial and still sponsored and relied upon by it at the second trial, contained "crude, amateurish forgeries" of the signatures of Wolcott and Williams as the officers purporting to sign the contract on behalf of Lumar. It was the alleged frustration of this contract which was a forgery out of which the pipeline and the extraction plant splinters of the case upon which the two judgments are based arose. The second trial judge characteristically initially stated that he thought this evidence was "highly relevant" (Court of Appeals Appendix, *supra*, 201) and later commented concerning this forgery:

> "THE COURT: The only thing I was going by was those new issues in the case that were not submitted to the old jury, and the new issues do involve credibility of witnesses, and here that jury found that this was not signed by Mr. Wolcott on his claim, that it was a forgery. *The jury wouldn't know that just reading the answers to the questions. They would just say, well, maybe something else, whether they claim the forgery, it just appears to me in fairness to the Defendants that they ought to be able to bring that out on the credibility of your people in regard to the subsequent oral agreement.*" (Emphasis Supplied) (Court of Appeals Appendix, *supra*, 206).

Despite this clear exposition of why this highly cogent impeachment testimony should have been permitted, the trial court, nevertheless, ultimately excluded it. (Court of Appeals Appendix, *supra*, 150-173). This is but another

example of numerous highly prejudicial and erroneous rulings in the second trial which did Petitioners irreparable damage. But we must be selective. We cannot go on indefinitely.

CONCLUSION

This case has been wrongly decided. Petitioners are saddled with two judgments which, with attorneys' fees and interest, exceed $2 million as a judicial windfall to a gas looter who had already expropriated, as twice found by the Supreme Court of Texas, millions of dollars of Petitioners' gas with legal impunity. Not only had the Woods' solely-owned companies escaped the normal legal consequences of appropriating and converting the property of another, but judicial imprimatur has been placed upon it by additionally rewarding him millions of dollars of damages never sustained.

More imortant however, to this Honorable Court for determining the question of review is the grave public question of gross misuse of a prior jury's verdict to deny a fair trial before a second jury. From the moment the trial judge read the first verdict to the jury on their impaneling, Petitioners never had a chance to receive a fair trial. The second trial judge fully understood this, for he so stated it at the Pre-trial Conference of October 30, 1972 as follows:

> "But the thing that disturbs me is, you see, it would be irretrievable if I were to instruct the jury that they had this judgment against them, and I don't want to do that, not unless I'm certain about it, because that would be such an irreparable damage that you couldn't correct it." (Court of Appeals Appendix, *supra*, 197).

It was, indeed, such "an irreparable damage" and the trial judge not only "couldn't correct it," but he made no attempt to correct it.

The imporant question to the jurisprudence of the United States and proper judicial administration is further the fragmentation of a single cause of action into splinters and the entry of a partial final judgment on one of them in clear violation of Federal Rule of Civil Procedure 54 and the resulting judicial maladministration of having two judgments based upon two jury verdicts returned in two separate trials in a suit on a single cause of action. This gross anachronism invites judicial malfunctioning in the future that should be corrected.

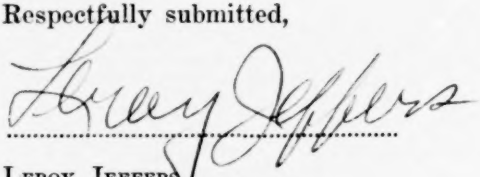
The invited prospects of procedural distortions which bind a Defendant by a jury finding of law violation in a prior trial in the course of subsequent multiple trials of multiple splinters of the single cause of action should be removed in the interest of sound jurisprudence. This is particularly true when the resulting distortions of piecemeal trials of a single cause of action result in the most probative and significant evidence in existence being excluded from jury consideration in any trial and a party thereby deprived of his Fifth and Seventh Amendment rights to a fair trial before one jury on his whole case.

The case further cries for review to preclude like future monstrosities when the deadly impeachment evidence of forgery directed at the claimant's credibility is excluded from use on the ground that the issue was adjudicated in the first of the multiple trials of the splintered single cause of action, while, at the same time, the jury in the subsequent trial is instructed that it may consider a combination to institute litigation by the Defendants as evidence of antitrust violation even though any issue of determining antitrust violation has been excluded from and denied to the jury being instructed, particularly when such instruction is in gross violation of Federal Rule of Civil Procedure 49 governing the submission of a case to the jury by the special verdict method.

Shocking injustice in the individual case has resulted from gross and unprecedented violations of judicial procedures with consequent violations of Constitutional guarantees. Review is merited and should be accorded.

The petition should be granted, the judgment of the Court of Appeals be reversed and the entire case be remanded to the trial court for a single new trial on the whole case. Despite the long delays such a full trial of the whole case before a jury has not yet been had.

Respectfully submitted,



LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

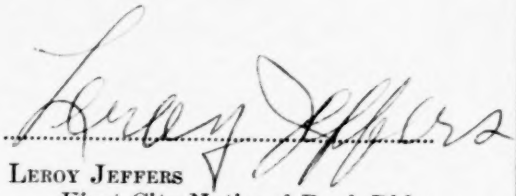
Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

Of Counsel:

ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address of record this 3rd day of June, 1975, thus serving all parties required to be served.



LEROY JEFFERS
First City National Bank Bldg.
Houston, Texas 77002
Counsel for Petitioners

SUPPLEMENT

FIRST VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WOODS EXPLORATION & PRODUCING CO., INC., ET AL.,

v.

ALUMINUM COMPANY OF AMERICA, ET AL.

CIVIL ACTION NO. 14,669

VERDICT

In connection with your deliberations of the following questions, you are instructed that plaintiffs have the burden of proof.

Question No. One

Did defendants Aloca and Crown enter into an illegal contract, combination, or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: No.

Question No. Two

Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, or either

of them, to monopolize any appreciable part of the trade and commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Question Nos. One and Two "No," then you need not answer any of the following questions, but if you have answered Questions No. One "Yes" or Question Two "Yes," or answered both Questions One and Two "Yes," then you will answer the following questions.

If you have answered Question Nos. One and Two "Yes," or either of them "Yes," then you will answer the following question:

Question No. Three

3(a) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa and Crown refuse to deal with Stanley C. Woods, individually, or Woods Exploration and Producing Company?

Answer this question either "Yes" or "No."

Answer: Yes.

3(b) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown employ

the surveying partnership of Joehnston & Ford to make an incorrect survey of the Carancahua townsite property.

Answer this question either "Yes" or "No."

Answer: No.

3(c) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown harass or interefere with the operation of Woods Exploration & Producing Company in the drilling of wells on the townsite lots in the Appling Field.

Answer this question either "Yes" or "No."

Answer: Yes.

Question No. Four

Did Fred A. Wolcott sign plaintiff's Exhibit No. 85A?

Answer this question either "Yes" or "No."

Answer: No.

If you have answered Questions Nos. One and Two "Yes," or either of them "Yes," and if you have answered Question No. Four "No," then you will answer the following question:

Question No. Five

As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent Fred Wolcott from signing plaintiff's Exhibit No. 85A?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Questions Nos. One and Two "Yes," or either of them "Yes," and if you have answered Question No. Four "No," then you will answer the following question:

Question No. 6

As a result of such illegal contract, combination or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent any other authorized representative of Lumar Gas Corporation, from entering into an agreement with plaintiffs Southeastern Pipeline Company, Stanley C. Woods, or Woods Exploration & Producing Company relating to the transportation of plaintiffs' gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: No.

Question No. Seven

What sum of money, if any, would fairly and reasonably compensate plaintiff Southeastern Pipeline Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any, were proximately caused by the illegal combination or conspiracy, or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Questions Nos. 4, 5 and 6, "No," then in connection with your answer to this Question No. Seven relating to damages, if any, you are not to take into consideration in connection with your deliberations of

damages, if any, to Southeastern Pipeline Company, any testimony or evidence relating to the building by Southeastern Pipeline Company of a gas transmission pipeline from the Appling Field to connect with the Tennessee Gas Transmission line, or the cost of any such line.

Answer this Question No. Seven by stating the amount in dollars and cents.

Answer: $142,759.00

"1) Loss of pipe purchased & not used = $4,059."

"2) 6 wks. loss production on 16,000 mcf/day at 11 cents/mcf gross divided by 2 for net = $79,200."*

"3) Loss of building 2nd pipeline $99,100."

---

* At the time the verdict was accepted by the court the foreman of the jury clarified that the figure should be $39,600. (Tr. 3343-44).

Question No. Eight

What sum of money, if any, would fairly and reasonably compensate Woods Exploration & Producing Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any, were proximately caused by the illegal combination or conspiracy or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Question 3(a) "No," then in connection with your deliberations concerning this question No. Eight, you will not take into consideration any testimony or evidence relating to the failure on the part of Alcoa and Crown to deal with Stanley C. Woods, individually, or Woods Exploration & Producing Company concerning the transportation of gas out of the Appling Field.

If you have answered Question 3(b) "No," then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to an incorrect survey or conflict in surveys in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

If you have answered Question 3(c) "No," then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to any harassment or interference with the operations of Woods Exploration & Producing Company in the Appling Field in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

You will answer this Question No. Eight by stating the amount in dollars and cents.

Answer: $500.00.

....

Date Foreman of the Jury

SECOND VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WOODS EXPLORATION & PRODUCING CO., INC., ET AL.,

v.

ALUMINUM COMPANY OF AMERICA, ET AL.

VERDICT

Question No. One

Do you find from a preponderance of the evidence that the plaintiff Southeastern Pipeline Company in September and October, 1960, had both the intention and the preparedness to participate in the necessary investment for the construction and operation of an extraction plant on Lumar Gas Corporation's pipeline and to share in the profits, if any, therefrom, which intention and preparedness included an agreement, as above defined, with Lumar Gas Corporation that such extraction plant would in fact be built?

Answer this question "Yes" or "No." Answer: Yes.

If you answer this question "No," then you need not answer the following questions.

If you answer this question "Yes," then proceed to answer the following issue.

Question No. Two

Do you find from a preponderance of the evidence that any wrongful actions of the defendants were the direct and

proximate cause of frustrating the agreement between plaintiff Southeastern Pipeline Company and Lumar Gas Corporation, if any you have found, and of preventing the construction and operation of an extraction plant on the Lumar gas pipeline by Lumar and Southeastern?

Answer this question "Yes" or "No." Answer: Yes.

If you answer this question "No," then you need not answer any further questions.

If you answer this question "Yes," then answer the following question.

Question No. Three

Do you find from a preponderance of the evidence that the plaintiff Southeastern Pipeline Company was injured in its business or property by the frustration of said agreement and the prevention of the building and operation of such plant, if any you have found?

Answer this question "Yes" or "No." Answer: Yes.

If you answer the foregoing question "No," then you need not answer the following question.

If you have answered the foregoing question "Yes," then answer the following question.

Question No. Four

What amount of money, if any, do you find from a preponderance of the evidence is required if paid now to compensate plaintiff Southeastern Pipe Line Company for the actual damages, if any, sustained by it by reason of any such injuries to its business or property?

Answer in dollars and cents. $352,223.04

....

Date Foreman

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

APPENDIX

To Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

LEROY JEFFERS
ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.
Attorneys for Petitioners
Aluminum Company of America
Crown Central Petroleum Corporation
Lavaca Pipeline Company

Of Counsel:

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002 — 236-2330

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WOODS EXPLORATION & PRODUCING CO., INC., ET AL.
v.
ALUMINUM COMPANY OF AMERICA, ET AL.

Civ. A. No. 14669.

United States District Court
S. D. Texas,
Houston, Texas.
March 29, 1968
(284 F.Supp. 582)
Memorandum and Order

SINGLETON, District Judge.

In December, 1962, plaintiffs, Woods Exploration & Producing Company, Stanley C. Woods, and Southeastern Pipe Line Company, filed the instant antitrust action against defendants, Aluminum Company of America, Crown Petroleum Corporation and Lavaca Pipe Line Company,[1] seeking injunctive relief and treble damages for alleged violations of the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1, 2, 15, 26 (1964). By their complaint, plaintiffs charged that defendants had restrained trade in the production and marketing of natural gas from the Appling Gas Field in Jackson and Calhoun Counties, Texas, and that defendants had monopolized and/or attempted to monopolize the production and marketing of gas from the field. Plaintiffs sought to recover as damages the loss of production from their wells in the field which had been occasioned by the entry of orders by the Texas Railroad Commission setting production allowables for plaintiffs' wells at levels lower than plaintiffs thought they should have received. Plaintiffs sought to hold defendants liable

[1] Plaintiffs also named as defendants certain employees of the defendant corporations. By stipulation and through the filing of their Third Amended Complaint, however, plaintiffs have dropped these parties as defendants.

for this loss on the ground that the Railroad Commission orders had been based, at least in part, on false nomination forecasts and reports filed by defendants with the Commission.

Defendants responded with a motion to dismiss for failure to state a claim, and, in the alternative, a motion for summary judgment. Both motions were overruled by another judge of this district, Woods Exploration & Producing Co. v. Aluminum Company of America, 36 F.R.D. 107 (S.D.Tex.1963), and in October, 1963, the Court of Appeals for the Fifth Circuit denied with the following order defendants' attempted interlocutory appeal from the order overruling their motion to dismiss.

> "Since the order sought to be reviewed is merely the denial of a motion to dismiss the complaint, leave to take interlocutory appeal should be, and it is hereby DENIED, *but without prejudice to an application in the future from any appropriate order made by the District Court after completion of pretrial discovery or other pretrial procedures revealing the factual basis for the respective claims and defenses as distinguished from mere pleadings.*" (Emphasis Added.)

In 1966, the case was transferred to this court as a docket equalization measure. Now, after the completion of extensive pretrial discovery, defendants have again moved for summary judgment. After reviewing thoroughly the numerous briefs filed by each side, as well as conducting an oral hearing on the motion, I feel compelled to disagree with the conclusion reached by my brother judge in his 1963 decision.

Before proceeding to the merits of the motion, however, I feel some comment is in order regarding plaintiffs' contention that this Court is without the power to entertain

the motion — that the prior ruling by a different judge has become the law of the case. In view of the fact that I reach the merits, needless to say I disagree. The wording of the appellate court order seems to invite the current motion, and, moreover, the law does not require a judge who will ultimately handle a case to decline to make an independent and objective determination of issues which are properly raised. Rather, whether to go into the merits of a question previously decided in a case prior to final judgment is a matter within the considered discretion of the judge. See Beedy v. Washington Water Power Co., 238 F.2d 123, 127 (9th Cir. 1956). See also 3 Barron & Holtzoff, Federal Practice & Procedure § 1192 (Wright ed. Supp. 1966); 1B Moore, Federal Practice, Para. 0.404[4], at 452. As stated by the Court in Ward v. Louisiana Wildlife Comm'n., 224 F.Supp. 252 (E.D.La. 1963),

> "A United States district judge is most reluctant to reverse or change a ruling or order of another district judge, sitting on the same case, in the same court, and will do so only for the most compelling reasons. However, *the authority of a judge to overrule a previous decision of a prior judge, sitting on the same case in the same court is well established* * * *. The United States Supreme Court has rejected a doctrine of disability at self correction* * * *." Id.* at 255. (Emphasis Added.)

By amended complaint, plaintiffs have now specified various other activities of the defendants taken pursuant to the alleged conspiracy. In large part, these allegations relate to a course of litigation either initiated by defendants or which was brought about by defendants' successful efforts to influence the Railroad Commission in setting field orders which applied to the Appling Field. Since the same basic principles which apply to the allegations concerning

the filing of false nominations apply alike to the latter allegations, they will also be considered.

After reviewing the numerous depositions and papers filed in the case, it is clear that there are disputed issues of fact on whether defendants actually conspired together and whether they deliberately filed the false nominations or brought about the litigation in question as part of a conspiracy. However, even if plaintiffs' allegations in these respects are true, plaintiffs would still not be entitled to recover damages for these activities. Thus for the purposes of this motion, I accept plaintiffs' basic allegations as true. Liberty Leasing Co., Inc. v. Hillsum Sales Corp., 380 F.2d 1013, 1014-15 (5th Cir. 1967).

FILING OF FALSE NOMINATIONS

A. *The Factual Context.*

Plaintiffs own, operate, or have an economic interest in wells drilled on small tracts located within a fifty-nine acre area lying in the heart of the Appling Gas Field. Most of plaintiffs' wells have been drilled as exceptions to the general spacing rule which restricts the drilling of wells to one well every 320 acres.[2] Defendants, on the other hand, own or have an interest in wells which have been drilled

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[2] Statewide Rule 37, Tex. R.R. Comm'n Rules & Regs. 1, at 15, Oil & Gas Rep. 1320 (1962). See generally Hardwicke & Woodward, Fair Share and the Small Tract in Texas, 41 Texas L.Rev. 75 (1962); Hardwicke, Oil-Well Spacing Regulations and Protection of Property Rights in Texas, 31 Texas L.Rev. 99 (1952). Most of plaintiffs' wells were drilled on extremely small tracts, some being located on tracts of less than 2/10 of an acre. Defendants' First Brief in Support of Summary Judgment, p. 3; Plaintiffs' First Opposition Brief, p. 2. See generally Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex.1964), reversing 368 S.W.2d 818 (Tex.Civ.App.—Austin 1963).

on large tracts subject to the general spacing rule. The allowable production which each well in the field is permitted to produce is set monthly by order of the Texas Railroad Commission. For the purpose of preventing waste, the Commission is charged with the task of limiting total production from the field to the reasonable market demand for gas made upon the field. Tex.Rev.Civ.Stat.Ann. art. 6008 § 3(h) (1964). Each producing well is entitled to its fair share of the total allowable field production, *id* § 12, an amount which has been held to be roughly equivalent to the gas in place under the tract on which the well is drilled.[3]

In the Appling Field, after first determining the total allowable for the field, the allowable for each well is determined by application of a one-third—two-third proration formula. One third of the field allowable is divided equally among the wells, and two-thirds is divided among the wells in the proportion to which the surface acreage on which the well is drilled bears to the combined surface acreage of all wells in the field. The heavy weight given to the well factor by this formula has meant that producers with wells on small tracts have been permitted by the Commission to extract far more gas than that underlying their tracts, thereby draining gas from beneath the larger

---

[3] Where the lessee or owner of a small tract has been granted a permit to drill a well as a Rule 37 exception, this means that "it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give the owner of such smaller tract only his just proportion of the oil and gas. *By this method, each person will be entitled to recover a quantity of oil and gas substantially equivalent in amount to the recoverable oil and gas under his land.*" Brown v. Humble Oil & Ref. Co., 126 Tex. 296, 83 S.W.2d 935, 944 (1935). (Emphasis Added.) See also Manufacturer's Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 461, 57 N.E. 912, 50 L.R.A. 768 (1900). In some instances, and particularly in the Appling Field, this "ideal" allocation of gas has not been attained. See Notes 4 and 5 *infra*.

adjoining tracts.[4] The inequitable effect of the formula has been compounded, moreover, by the fact that many wells on large tracts, although producing at full capacity, have been unable to produce even the allowable assigned to them under the formula. As a result the amount they have been unable to produce has been allocated by the Commission to the small-tract wells not already producing at full capacity.[5] It is in this context that the plaintiffs complained of

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[4] The one-third — two-third formula was declared invalid by the Texas Supreme Court in Atlantic Ref. Co. v. Railroad Comm'n., 162 Tex. 274, 346 S.W.2d 801 (1962), on the ground that it allowed small-tract owners to produce more than their fair share and amounted to confiscation of gas underlying the large tracts. In Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex. 1964), however, the court upheld the formula insofar as it applied to the Appling Field on the ground that the large tract owners were guilty of laches in attacking it. Although the court recognized that small-tract owners had drained substantial quantities of gas from beneath the large tracts, and had recouped their costs and made a profit, and would during the the life of the field drain several million dollars worth of gas from beneath tracts leased to Aluminum Company of America alone, id. at 604, it found other factors to be more persuasive.

> "There are many reasons why stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole state rests to a large extent on the oil and gas business." *Ibid.*

[5] Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313, 316 (Tex.1966).

> "An example will serve to illustrate the problem. One of the reservoirs in the Appling Field is designated as Segment 5, 7500′ and 18 wells were completed therein. Seventeen of these wells were located on 7.132 acres, while the remaining well was situated on a 328 acre unit. * * * The total delivery capacity of all 18 wells was approximately 898,000 MCF per month, and the production forecasts results in the determination that reasonable

defendants' filing false production forecasts which reduced the total field allowable.

B. *The Nomination Procedure.*

As previously stated, the total allowable for a field is set at what the Railroad Commission determines to be the reasonable market demand for the field's gas. No statutory provision prescribes the procedure by which market demand is to be determined, and thus the matter falls under the rule-making power of the Commission. The usual procedure which the Commission follows is set out in Statewide Rule 31. Under its provisions, market demand is ordinarily determined primarily on the basis of Producer's Forecasts filed with the Commission by operators having wells in the field. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month. The nominations are totaled and, if the Commission concludes that their total accurately reflects market demand, the total becomes the field allowable to which the one-third—two-third formula is applied. If the Commission disagrees with the forecasts, however, it may consider other factors such as average production for the previous twelve months, or nominations filed by purchasers of gas. Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313, 315 (Tex. 1966). In most instances in the Appling Field the producer's forecasts are

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market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCF. Under the basic $\frac{1}{3} - \frac{2}{3}$ allocation formula, the large tract well was entitled to an allowable of 591,000 MCF. * * * The productive capacity of the single large tract well was only about 34,000 MCF, and in accordance with the usual Commission procedures some 557,000 MCF were allocated to the [small tract] wells * * ** in addition to their shares of the reservoir allowable as determined by application of the $\frac{1}{3} - \frac{2}{3}$ formula." *Ibid.*

corrected by the difference between the total of the current nominations and total actual production which was allowed for the second preceding month.[6]

C. *The Liability Issue.*

Whether plaintiffs can recover for the loss of production they allegedly suffered as a result of the low allowables set by the Railroad Commission involves a now rather undeveloped area of federal antitrust law. As state regulation of the economy increases, however, and particularly in the area of conservation, it can easily be predicted that many questions will arise similar to those raised in the instant case.[7]

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[6] Under this method of determining the field allowable, the following calculations would be involved.

(a) Total nominations for Second Preceding Month	110
Total allowable for non-prorated wells for Second Preceding Month	20
Total nominations for Prorated Wells for Second Preceding Month	90
Total Actual Production of Prorated Wells in Second Preceding Month	80
Difference	10
(b) Total Nominations for Current Month	110
Difference Between Total Nominations and Actual Production in Second Preceding Month	—10
Total Field Allowable for Current Month for All Wells	100

Tex. R.R. Comm'n Rules & Regs. Appendix, at 39; see Parris & Edgerton, Non-Associated Gas Proration 4 (1961). See also Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, 98-99 (5th Cir. 1966).

[7] In some instances, Congress has recognized that there is a basic conflict between the competitive thrust of the antitrust laws and the anticompetitive thrust of state regulatory schemes. For instance, in the area of insurance, Congress has sought to eliminate friction which might result because of simultaneous application of state and federal law.

The starting point in this and any other antitrust case not involving a matter of per se illegality is Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 51-52, 31 S.Ct. 502, 55 L.Ed 619 (1911), in which the Supreme Court announced the "rule of reason" as the test for determining the applicability of the antitrust laws to a given situation. Pursuant to this test, it has been held consistently that as a matter of statutory interpretation the Sherman Act does not apply to the actions of a state. As stated by the court in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943):

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act *specifically* relates to the business of insurance: Provided, That * * * [the federal antitrust laws] shall be applicable to the business of insurance *to the extent that such business is not regulated by State law.*" (Emphasis Added.)

McCarran Ferguson Act, 15 U.S.C. § 1012(b) (1963); see Miley v. John Hancock Mut. Life Ins. Co., 148 F.Supp. 299 (D.Mass. 1957). A comparable forthright approach to resolving similar conflicts in the oil and gas area would not be inappropriate, for there are many parallels between state regulation of both industries, state regulation of both being equally comprehensive and detailed.

The federal courts have been careful to avoid applying the Sherman Act where its application might conflict with the Federal Power Commission's regulation of the natural gas industry. Interstate Nat. Gas Co. v. Southern California Gas Co., 102 F.Supp. 685, 103 F.Supp. 317 (S.D.Cal.1952), aff'd), 209 F.2d 380 (9th Cir. 1953). Moreover, the activities made the subject matter of the instant suit involve Railroad Commission regulations concerning the production and gathering of natural gas from the Appling Field, and this subject Congress has chosen to exempt from federal supervision in favor of state regulation. Natural Gas Act, 15 U.S.C. § 717(b) (1963). Therefore, since these activities are subject to exclusive regulation by the Texas Railroad Commission, a like caution and deference should be shown when the alleged Sherman Act violation involves Railroad Commission regulations and matters subject to the Commission's exclusive jurisdiction.

> "[There is] nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.
>
> "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Id. at 350-351, 63 S.Ct. at 313.

Accordingly, the states have been left free to regulate industries within their boundaries by curtailing competition or eliminating it altogether, Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 505 (4th Cir. 1959), subject only to the limitations inherent in the commerce clause or any restrictions imposed by federal statutes. However, when a private party as opposed to a state itself has been sought to be held liable for damages resulting from restraints imposed by a state, the cases reflect more than a little uncertainty on whether, and in what situations, the private party whose improper conduct is the reason the state has imposed a trade restraint is immune simply because the restraint was imposed by the state.[8]

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[8] For example, in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), three cases which were finally decided in the Supreme Court, the lower courts were reversed for imposing liability. Also, there appears

In Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5L.Ed.2d 464 (1961), forty-one Pennsylvania truckers and their trade association brought suit against twenty-four railroads and an association composed of the presidents of each railroad. The truckers charged that the railroads had conspired to restrain trade in and monopolize the long-distance freight business in violation of the Sherman Act. The essence of the conspiracy was that the railroads had conducted a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business. The campaign proved successful, for the railroads persuaded the governor of the state to veto a "Fair Truck Bill" which would have permitted the truckers to haul heavier loads over the state's highways. Moreover, the publicity campaign had the additional effect of destroying much of the truckers' good will. The district court found that the publicity campaign was fraudulent and malicious and that its sole purpose was to destroy the truckers as competitors even though no legislation was secured. For this reason, it awarded substantial damages for the truckers' loss of good will. However, the district court was also of the view that restraints of trade and monopolizations resulting from valid governmental action are not actionable under the Sherman Act and thus refused to award damages for the loss of business caused by veto of the "Fair Truck Bill."

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to be a conflict on whether joinder of the state official who uses his office to impose the restraint makes a difference on whether the private party can be held liable. *Compare* Harman v. Valley Nat'l Bank of Arizona, 339 F.2d 564 (9th Cir. 1964), *with* Miley v. John Hancock Mut. Life Ins. Co., 148 F.Supp. 299 (D.Mass. 1957). See also E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, 362 F.2d 52 (1st Cir. 1966). In the instant action, there is no issue concerning the liability of the Railroad Commission or any individual member thereof.

Noerr Motor Freight, Inc., v. Eastern Railroad President's Conf., 166 F.Supp. 163, 172-73 (E.D.Pa. 1958). The Court of Appeals affirmed with one judge dissenting. Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc., 273 F.2d 218 (3d Cir. 1959). Applying the "rule of reason", however, the Supreme Court reversed, holding that the truckers could as a matter of law recover no damages for injury sustained because of the efforts of the railroads to influence governmental action.

In reaching this result, the Court noted that there was an "essential dissimilarity" between the lobbying activities conducted by the railroads and the activities normally prohibited by the Act, and that to impose liability for this conduct would raise serious constitutional questions and political difficulties.

> "We think it * * * clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt *to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.* * * * [The railroads' activities] bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements. This essential dissimilarity between an agreement jointly to seek legislation or *law enforcement* and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. * * * [Moreover, to impose liability] would substantially

> impair the power of government to take actions through its legislature and executive that operate to restrain trade. * * * To hold that the government retains the power to act in this representative capacity and yet hold * * * that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act. Secondly, and of at least equal significance, such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Id. 365 U.S. at 136-138, 81 S.Ct. at 529. (Emphasis Added.)

Plaintiffs seek to distinguish *Noerr* on the ground that it exempts only "political activity" from the scope of the Sherman Act and thus is not controlling for they contend, the filing of false nomination is properly "business activity" and not "political activity" protected by *Noerr*. This proffered distinction, I think, places more emphasis than is warranted on the phrase "political activity," as used by the Court in *Noerr*. Plaintiffs contend that protected "political activity" encompasses only lobbying activities or influence peddling and does not apply to a situation such as this where the defendants and all other producers are required by Commission regulations to submit nominations under oath. There is some doubt whether this line of reasoning is accurate. In Sterling Nelson & Sons, Inc. v. Rangen, Inc., 235 F.Supp. 393,400 (D.Idaho 1964), for example, the Court held that there was no liability even though the defendant had bribed a state official to use his position to impose a trade restraint harmful to the plaintiff. In addition, it has been held in other cases that there is no liability although the conduct complained of violates a valid

state penal statute[9] or even though the conduct gives rise to a civil cause of action under state law.[10] If activities of this character are not within the ambit of the antitrust laws, then it is difficult to perceive how the activities of the defendants here can be viewed differently. However, it is unnecessary to resolve the issue on a determination that the filing of false nominations is or is not political activity. The mere manipulation of labels does not determine the outcome of this case, for as made clear by other cases, liability is precluded if the restraint complained of results from otherwise valid governmental action even though brought about by the improper conduct of a private party.

Plaintiff's limited construction of *Noerr* ignores the fact that the Supreme Court did not disapprove the district court's holding that the truckers could recover no damages for injury resulting from any valid action of the state. See 365 U.S. at 135-136, 60 S.Ct. 982. In Parker v. Brown, supra, and United States v. Rock Royal Cooperative,, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1938), the Supreme Court had previously upheld goverment regulatory schemes involving the production and marketing of milk and raisins even though the schemes permitted and required some participation by the producers affected. In both cases, the Court held that the regulation itself was not invalid because it constituted a restraint on trade and also that the

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[9] *E. g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 483, 60 S.Ct. 982, 84 L.Ed. 1311 (1940); Parmelee Transportation Co. v. Keeshin, 292 F.2d 794 (7th Cir. 1961); Schenley Industries, Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n., 272 F.Supp. 872 (D. N.J. 1967).

[10] *E. g.*, Hunt v. Crumbock, 325 U.S. 821, 826, 65 S.Ct. 1545, 89 L.Ed. 1954 (1945); Apex Hosiery Co. v. Leader, *supra* note 9, 310 U.S. at 483, 60 S.Ct. 982; Norville v. Globe Oil & Ref. Co., 303 F.2d 281 (1962); Parmelee Transportation Co. v. Keeshin, *supra* note 9, 202 F.2d at 804; Sterling Nelson & Sons, Inc. v. Rangen, Inc., *supra*, 235 F.Supp. at 400.

producers who were benefitted by the regulation and who were instrumental in initiating it could not be held liable in damages.

In United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed. 2d 626 (1965), decided four years after *Noerr*, the Mineworkers' Union and several large coal producers conspired to drive smaller coal producers out of business. In furtherance of the conspiracy, they persuaded the Secretary of Labor to set a higher minimum wage for the employees of coal producers selling to the TVA and induced the officials of TVA itself to reduce the number of the TVA's "spot market" purchases — many of which were exempt from the minimum wage requirements of the Walsh-Healey Act. The district court awarded substantial damages, and the court of appeals affirmed, distinguishing *Noerr* on the ground that although the conduct complained of might be lawful when standing alone, it became unlawful when shown to be a constituent part of a larger, unlawful conspiracy. Pennington v. United Mine Workers, 325 F.2d 804 (6th Cir. 1963). The Supreme Court reversed, but in doing so chose not to rest its decision alone on the ground that the activity was protected "political activity" within the meaning of *Noerr*. Rather the Court went further and interpreted *Noerr* more broadly:

> "There is another reason for remanding this case for further proceedings in the lower courts. *It is clear under Noerr that Phillips could not collect any damages under the Sherman Act for any injury which is suffered from the action of the Secretary of Labor.* The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and *the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations.*" *Id.* 381

U.S. at 671,, 85 S.Ct. at 1594. (Emphasis Added.) See also United States v. Johns-Manville Corp., 259 F. Supp. 440 (E.D.Pa.1966).

Perhaps of even more significance than this statement in the opinion is the fact that the Court cited with approval the decision of the court of appeals in Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413 (5th Cir. 1954), a case which is closely in point with the instant action. In *Okefenokee,* the plaintiff brought suit against Florida Light & Power Company and the City of Jacksonville, Florida, alleging that these defendants had "engaged in an unlawful combination and conspiracy to monopolize and exercise exclusive control over the territory" into which plaintiff was seeking to extend electric power lines. The only feasible route from an engineering and economic standpoint along which a new power line could be built lay along Federal Highway 17. On January 25, 1952, plaintiff staked a proposed line along the highway, and on February 26, 1952 it applied to the Florida State Road Department for permission to construct a line along the route. During this period, however, the defendants constructed a "spite line" along the same route for the sole purpose of defeating plaintiff's application for a permit. Only two persons could be served by the defendants' spite line, and indeed the only wire placed on the line by the City was a "neutral strand." In pursuance of the conspiracy, the City made a false argument before the Road Department that a line had already been constructed and that no new line should be built. As a result of these two actions, the Road Department denied plaintiff's application. Moreover, the defendants conducted a smear campaign against plaintiff, thereby causing the County Commissioners of Duval County to pass discriminatory regulations applicable only to plaintiff and designed to prohibit plaintiff from operating in Duval County. The district court dismissed

the complaint for failure to state a claim. The court of appeals affirmed, reasoning that since the plaintiff had no right to use the highway route without a permit from the state nor any route along the county roads without permission of the Board of County Commissioners, the plaintiff had suffered no "legal injury."

I think the principle announced in *Pennington* and *Okefenokee* is controlling as to the damages plaintiffs allegedly suffered because of the allowables set by the Railroad Commission. Plaintiffs, however, have advanced two contentions as a basis for taking their action outside the scope of these precedents. First, they seek to distinguish *Okefenokee* on its facts, but this they have not successfully done. Plaintiffs contend that *Okefenokee* is distinguishable because they have been granted a permit to drill and produce gas whereas the plaintiff in *Okefenokee* was injured because of the state's refusal to grant a permit. This distinction is tenuous at best, for its thrust is to limit *Okefenokee's* application to cases involving the denial of permits by state agencies, a limitation which is inconsistent with the Court's reasoning. As stated by Judge Biggs "implicit in [the *Okefenokee*] ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency, *however inspired by the acts of individual.*" Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc., 273 F.2d 218, 226 (3rd Cir. 1959) (dissenting opinion) (Emphasis Added.) Moreover, there are two crucial similarities between the two cases. In both, the injury complained of resulted directly from specific action taken by a state administrative agency on the basis of false information provided by private parties. Secondly, just as certainly as the plaintiff in *Okefenokee* had no legal right to use a particular route for the construction of a power line without the consent of the State of Florida, the plaintiffs here have no

legal right to produce an amount of gas in excess of the specific allowable assigned to them by the State of Texas acting through the Railroad Commission. See Tex.Rev. Civ.Stat.Ann.art. 6008 § 16 (1964).

Plaintiffs' second contention is that, since each producer is required by the Railroad Commission to submit production forecasts under oath so as to provide information on the basis of which the Commission sets allowables, the producers are in effect possessed of broad discretionary powers by which they set the allowables themselves and thus the case is controlled by Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

In *Continental Ore*, the plaintiff brought suit against several American corporate defendants alleging that they had conspired to restrain trade and commerce in the production and selling of vanadium and that they had conspired to monopolize the vanadium market. Among other elements of damages, plaintiff sought to recover damages which it had suffered by being eliminated from competition in the Canadian market. After Canada's entry into World War II, the Canadian Government had taken measures to assure the maximum availability of strategic metals to private Canadian industries engaged in the war effort. The Office of Metals Controller was established and given broad powers to regulate the procurement of materials and to allocate them to industrial uses. The Metals Controller delegated to a Canadian corporation, a wholly owned subsidiary of one of the defendants, the discretionary power to purchase vanadium and to allocate them to industrial users. In pursuance of the conspiracy, the parent corporation directed its subsidiary in making vanadium purchases so that the plaintiff lost all its customers and was eliminated from the Canadian market. The district court refused to award damages for this injury, and the court of

appeals affirmed. Continental Ore Co. v. Union Carbide & Carbon Corp., 289 F.2d 89 (9th Cir. 1961). The Supreme Court, however, reversed, and with a unanimous opinion held that the parent's use of the subsidiary's discretionary power as the agent of a foreign state in order to drive a competitor out of business was actionable under the anti-trust laws.

In speaking to the defendants' contention that they could not be held liable because the injury was inflicted by an agent of a foreign state, the Court stated:

> "What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. * * * From the evidence which petitioners offered it appears that Continental complained to the Canadian Metals Controller that Continental had lost its Canadian business. * * * *But there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. The exclusion Continental claims, resulted from the action of Electro Met of Canada [the subsidiary], taken within the area of its discretionary powers granted by the Metals Controller and in concert with or under direction of the respondents.*" Id. 370 U.S. at page 706, 82 S.Ct. at page 1414. (Emphasis Added.)

Unlike *Continental Ore,* however, the defendants here have been delegated no discretionary power to set gas production allowables in the Appling Field. The Texas Supreme Court made clear in Railroad Comm'n v. Woods Exploration & Producing Co., 405 S.W.2d 313 (Tex. 1966), that the Commission alone has the power and the duty to set allowables. The procedure followed by the Commission of requiring the producers to submit forecasts before the

allowables are set is no more than a mere "administrative device." *Id.* at 319. The figures submitted by the individual producers are not binding on the Commission, and it does not have to set allowables based on their mathematical total. Thus any injury which *any* producer claims to have suffered because of the allowable assigned to him is an injury directly inflicted by the Railroad Commission and not an injury inflicted by his fellow producers directly or through the exercise of any discretionary power conferred upon them by the State.

The injury which plaintiffs complain to have suffered here because of the allowables assigned by the Railroad Commission falls under the definition of state action set forth in Parker v. Brown, *supra,* and thus does not constitute a recoverable element of damages in a federal antitrust action.

> *"It is the state which has created the machinery for establishing the prorate program.* Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by a referendum of producers, *it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy.* The prerequisite approval of the program upon referendum by a prescribed number of producers is not the impostion by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. *The state iself exercises its* • • • *authority in making the regulation and in prescribing the conditions of its application." Id* 317 U.S. at 352, 63 S.Ct. at 314. (Emphasis Added.)

As noted by the court of appeals for the Fourth Circuit:

> "The teaching of Parker v. Brown is that the antitrust laws are directed against individual and not state ac-

> tion. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." Asheville Tobacco Board of Trade, Inc. v FTC, 263 F.2d 502, 509 (4th Cir. 1959).

The scheme for settling allowables is adequately controlled by the Railroad Commisison, and under state law the plaintiffs have effective remedies to protect them against any adverse effects which might flow from the filing of false nominations. The filings of false nominations itself is a violation of state penal law.[11] Tex.Rev.Civ.Stat.Ann. art. 6036c (Supp. 1966). Additionally, the filing of false nominations will apparently support a cause of action under the state's statutory[12] and common law.[13] Simply by veiling

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[11] However, a "private antitrust complaint is not the appropriate vehicle for state criminal laws whose enforcement is entrusted to state or local prosecutors." Schenley Industries, Inc. v. New Jersey Wine & Spirit Wholesale Ass'n., 272 F. Supp. 872, 885 (D.N.J.1967). See also cases cited in note 10 *supra*.

[12] Tex.Rev.Civ.Stat.Ann. art. 6049d § 13 (1964); see Woods Exploration & Producing Co. v. Aluminum Company of America, 382 S.W.2d 343 (Tex.Civ.App.—Corpus Christi 1964, writ ref'd n.r.e).

[13] See Pan American Petroleum Corp. v. Hardy, 370 S.W.2d 304 (Tex.Civ.App.—Waco 1964, writ ref'd n. r. e.); *cf.* Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex.Civ.App.—Dallas 1962, writ ref'd n. r. e.). The fact that damages are recoverable in a civil action based on state law does not mean perforce that damages are recoverable under the Sherman Act upon a similar showing. As stated by the Supreme Court:

> "[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. * * * Whether the respondent's conduct amounts to an actionable wrong subjecting them to liability for damages under [state law] is not our concern." Hunt v. Crumbock, 325 U.S. 821, 826, 65 S.Ct. 1545, 1548, 89 L.Ed.1954 (1945).

their grievance under the penumbra of a conspiracy charge, however, plaintiff's cannot convert what are in essence only violations of state law and what is primarly a matter of state concern into a federal antitrust violation. Norville v. Globe Oil & Ref. Co., 303 F.2d 281 (7th Cir. 1962); see Natural Gas Act, 15 U.S.C. § 717(c) (1963). See also note 7 *supra*.

THE LITIGATION

The remaining allegations of plaintiffs' complaint which are involved in the present motion relate to efforts by defendants taken before the Railroad Commission to bring about a change in Commission rules and regulations and to litigation instituted or defended by defendants involving the validity of certain Commission rules and regulations. As to any efforts taken by defendants before the Commission to influence the Commission to alter old rules or promulgate new ones, it is clear that ***Noerr, Pennington,*** and *Okefenokee* preclude liability. Compare Ramsey v. United Mine Workers, 265 F.Supp. 388, 422 (E.D.Tenn. 1967). Moreover, if the doctrines set forth by these cases are to have any meaning, plaintiffs are likewise precluded from recovering as damages any legal or court costs which they incurred in setting the rules aside. If defendants cannot be held liable in the first instance for persuading the Railroad Commission to enter a new field rule which later becomes the subject matter of litigation, then it necessarily follows that via the back door they cannot be held liable for any loss they incurred while an order was in effect or any costs which they incurred in setting it aside. *Cf.* Fiumara v. Texaco, Inc., 204 F.Supp. 544 (E.D.Pa. 1962). This conclusion controls as to any damages which plaintiffs seek to recover because of the litigation in Railroad Comm'n v. Woods Exploration & Producing Co., *supra,* in which the Texas Supreme Court by a six to three decision struck down

a Commission order setting allowables for the field at a level lower than reasonable market demand.

The remaining litigation identified by the parties in their briefs was instituted by defendants in an attempt to stop the drainage of gas from beneath their tracts because of rules prescribed by the Commission. At lease one court has held that *Noerr* applies to such joint efforts taken in the courts by holding that "seeking lawful • • • judicial action does not violate the anti-trust laws, even if interstate commerce is involved and even if the purpose and effect is to curtail compeltion." Bracken's Shopping Center, Inc. v. Ruwe, 273 F. Supp. 606 (S.D.Ill. 1967). But even if *Noerr* does not extend this far, the litigation of which plaintiffs complain cannot afford a recoverable element of damages, for it is clear that the suits were initiated with probable cause.

In Benz-Stoddard v. Aluminum Company of America, 368 S.W.2d 94 (Tex. 1963), suit was brought challenging the validity of a Railroad Commission order, which, by treating vertically-separate reservoirs for proration purposes, allowed small-tract owners multiple completions from a single well. There, under the challenged Commission order, a small-tract owner with a well located on a .115 acre tract had already produced more than seven times the amount of gas in place under her tract, and, if the order continued in effect, would along with other small-tract owners, be allowed to further drain gas from beneath the larger, adjoining tracts. In the second suit, Railroad Comm'n v. Aluminum Company of America, 380 S.W.2d 599 (Tex.1964), suit was brought challenging the validity of the one-third — two-thirds proration formula as it applied to the Appling Field. The Purpose of this latter suit was also to stop or at least curtail the huge drainage of gas from beneath the larger tracts of defendants. See note 5 *supra*. Both these cases raised points of first impression for the Texas courts.

In the first case, the defendants were successful in advancing their contentions in the court of civil appeals. See Aluminum Company of America v. Benz-Stoddard, 357 S.W. 2d 809 (Tex.Civ.App.—Austin). In the latter case, the defendants were successful in both the trial court and the court of civil appeals. Railroad Comm'n v. Aluminum Company of America, 368 S.W.2d 818 (Tex.Civ.App.—Austin). The ultimate reversal in both cases by the Texas Supreme Court does not detract from the conclusion that defendants had probable cause to file the suits in question. It is not the final disposition of a case which determines whether probable cause existed at the *outset*. The judgments of the court of civil appeals show conclusively that defendants had probable cause to believe that the challenged Commission orders were invalid. Compare Citizen's Wholesale Supply Co. v. Snyder, 201 F. 907 (3d Cir. 1913); Bracken's Shopping Center, Inc. v. Ruwe, *supra*.

Therefore, it is ordered, adjudged, and decreed that the plaintiffs in this cause are not entitled to recover as damages any loss they might have suffered because of false production forecasts filed by defendants with the Texas Railroad Commission or any loss or expense which they might have suffered as a result of any litigation identified in this opinion concerning the validity of Railroad Commission rules, regulations, or orders. However, since there are other allegations in plaintiff's complaint which, if true, would entitle them to a favorable judgment, summary judgment in favor of defendents is limited to the elements of damage specified above. As to these:

This is a final judgment.

Counsel for defendents will draft and submit an appropriate order after first obtaining approval from counsel for plaintiffs.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.

v.

ALUMINUM COMPANY OF AMERICA, ET AL.

Civ. A. No. 14669.

United States District Court
S. D. Texas,
Houston, Texas.
October 2, 1969.
(304 F.Supp. 845).

Memorandum and Opinion

SINGLETON, District Judge.

This case involves alleged violations of section 1 of the Sherman Antitrust Act[1] and an attempt to recover treble damages under the provisions of the Clayton Act.[2]

Plaintiff's are Southeastern Pipe Line Company, a corporation, which after January 1, 1961, operated a pipeline between Appling Field in Jackson and Calhoun Counties, Texas, and the Tennessee Gas Transmission A-K line to which it was connected at Francitas, Texas; Woods Exploration & Producing Company, Inc., a corporation which operated as an oil and gas business; and Mr. Stanley C. Woods. Mr. Woods owned all of the stock of Woods Exploration & Producing Company, Inc. and Southeastern Pipe Line Company.

Defendants are Aluminum Company of America, commonly referred to as "Alcoa," a corporation that does business and has operations in Texas and other states. Alcoa owned, operated, and marketed gas reserves in Jackson and Calhoun Counties, Texas, which it owned and operated with Crown Central Petroleum Corporation, commonly referred to as "Crown," including gas reserves in the Appling Field. Crown primarily manufactures motor gaso-

[1] 15 U.S.C. § 1 (1963).
[2] 15 U.S.C. § 15 (1963).

line, lubricating and fuel oils, and does business and has operations in Texas and other states. Lavaca Pipe Line Company, commonly referred to as "Lavaca," is a corporation organized for the purpose of operating a pipeline, and is a wholly owned subsidiary of Alcoa, and Lavaca owned and operated a pipeline in the vicinity of the Appling Field in Calhoun County, Texas.

The co-conspirators in the case are alleged to have been F. E. Appling, a resident of El Campo, Wharton County, Texas, Carl E. Siegesmund (Pocantico Oil & Gas Corporation, long before the suit succeeded to all of Siegesmund's interest), and Houston Pipe Line Company, a wholly owned subsidiary of Houston Natural Gas Corporation, which was organized for the purpose of operating a pipeline and for the distribution and processing of natural gas and other commodities. This company purchased gas produced in the Appling Field, owned by Alcoa, Crown, and Pocantico and, accepted delivery at the tail gate of Alcoa's Point Comfort Plant, and transported a portion of such gas to Monsanto Chemical Company in Texas City and Chocolate Bayou, Texas.

This controversy arises out of the discovery of, the production from, and the sale and transporation of natural gas out of the Appling Field in Calhoun and Jackson Counties, Texas. This suit was originally filed in December of 1962. Initially, the thrust of plaintiffs' lawsuit centered around the claim by plaintiffs that defendants had conspired together to file false nominations with the Texas Railroad Commission in an effort to restrain trade in the production and marketing of natural gas and monopolized or attempted to monopolize the production and marketing of gas from this field. This Court granted defendants' motion for summary judgment on this phase of the case.[3]

[3] Woods Exploration & Prod. Co. et al. v. Aluminum Co. of America et al., 284 F.Supp. 582 (S.D.Tex.1968).

Litigation between the parties arising out of the subject matter of this suit has been extensive.[4] Trial of the instant case was held after plaintiffs omitted from the case the false nominations feature as a result of this Court granting defendants' motion for summary judgment. Woods Exploration & Prod. Co. et al v. Aluminum Co. of America et al., *supra,* and plaintiffs went to trial on their fourth amended petition. The trial was before a jury. The jury was asked two basic questions as follows:

> *Question No. One*
>
> Did defendants Alcoa and Crown enter into an illegal contract, combination, or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing, and transporting gas from the Appling Field?
>
> *"Question No. Two*
>
> Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, to monopolize any appreciable part of the trade and commerce of drilling for producing, and transporting gas from the Appling Field?"

The Jury answered Question No. One "No" and answered Question No. Two "Yes." There were other questions asked and answered by the jury as a result of the affirmative answer to Question No. Two, but for the purpose of this Memorandum Opinion no useful purpose would be served to detail those questions and the answers of the jury.[5] In

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[4] See generally Railroad Comm'n v. Aluminum Co. of America, 380 S.W.2d 599 (Tex.1964), reversing 368 S.W.2d 818 (Tex. Civ.App.—Austin 1963), and Woods Exp. & Prod. Co. et al v. Aluminum Co. of America et al., *supra.*

[5] With respect to the jury's answers to the other questions answered, this Court is of the opinion that there is sufficient evidence in the record to support the jury's answers to these questions.

answer to the damage issue, the jury awarded damages to plaintiff Southeastern Pipeline Company in the total amount of $142,759.00, and awarded damages to Woods Exploration & Producing Company in the amount of $500.00.

This Court grants defendants' motion for judgment notwithstanding the verdict of the jury with respect to its answer to Question No. Two.[6] In so doing, this Court, for the reasons set forth in this opinion, holds that there was insufficient evidence to support the jury's findings to Question No. Two, and the Court should have granted defendants' motion for a directed verdict at the close of the evidence.

The natural gas involved in this lawsuit is found in what is known as the Appling Field in Jackson and Calhoun Counties, Texas, and a part of this field lies under Carancahua Bay in those counties. The Appling Field was discovered in 1953. The discovery well in this field was completed as a gas producer in the Mid-Kopnicky in 1953. Defendants in this case own or have leases on approximately 90% of this field. On the perimeter of the bay is an area known as the Carancahua Townsite and generally consists of vacant, small town lots. The acreage of these lots amounts to considerably less than one-half of one per cent of the entire acreage of the field. Around 1960 plaintiffs began leasing up these small lots and commenced drill-

[6] See Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc) as it relates to the standard to be used for motions for directed verdict or motions notwithstanding the verdict in federal cases. Also, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962) wherein the Supreme Court on this particular point held that the standard to be used in jury trials in federal courts involving the Sherman Antitrust Act, in connection with motions for directed verdict or motions notwithstanding the verdict was that "the [district court] was, of course, bound to view the evidence in the light most favorable to the [nonmoving party] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."

ing operations and completed nine or ten gas wells. The principle sand in the Appling Field is known as the Mid-Kopnicky, Segment A, and is the deepest producing sand and contains approximately 80% of the entire gas reserves in the entire area.

Plaintiffs claim that as a result of the agreements the defendants had among themselves and with the alleged co-conspirators, defendants not only attempted to prevent plaintiffs from obtaining leases on the town lot sites, but also after plaintiffs had obtained such leases defendants refused to deal with plaintiffs to enable plaintiffs to drill for, complete, transport, and market plaintiffs' gas, and defendants harassed plaintiffs in plaintiffs' efforts to drill and complete plaintiffs' wells. As stated, plaintiffs did complete nine or ten gas wells. Plaintiff Southeastern Pipeline Company built a pipeline and transported through this pipeline plaintiffs' gas for marketing purposes. However, plaintiffs contend that defendants should have allowed plaintiffs to transport gas through defendant Lavaca Pipeline Company's pipeline, or, if not, that in connection with plaintiffs building its pipeline defendants caused plaintiffs to spend more money than plaintiffs should have had to spend by forcing plaintiffs to select a longer and more costly route for its pipeline, and that defendants' harassment of plaintiffs in connection with plaintiffs' drilling operations cost plaintiffs unnecessary additional money.

Plaintiffs allege that the combination or conspiracy and the attempt to monopolize on the part of the defendants originated with various agreements executed between Alcoa, Crown, and Appling. These agreements are summarized in plaintiffs' Exhibits 2A, 3A, 167A, and 25A. It is plaintiffs' contention that after these agreements were executed, defendants Alcoa and Crown and the alleged co-conspirator F. E. Appling used the rights they acquired in connection with these agreements, individually and joint-

ly, to effect such a combination or conspiracy to unduly restrain trade as is forbidden by Section 1 of the Sherman Antitrust Act, and to monopolize, or attempt to monopolize, or to conspire to monopolize as is forbidden under Section 2 of the Sherman Antitrust Act.

Another agreement plaintiffs allege to be a part of their case is the right-of-way agreement executed by F. E. Appling and Lumar Gas Pipeline Corporation, plaintiffs' Exhibit No. 83. Plaintiff's Exhibit 2A, 3A, 167A, and 25A were summaries dictated by counsel and the Court, summarizing joint operating agreements and amendments between Alcoa and Crown, agreements relating to transporting defendants' gas through Lavaca Pipeline Company's pipeline, as well as the agreements relating to assignments of leases between the parties, and the basic agreement between Alcoa and F. E. Appling concerning Mr. Appling's leasing to Alcoa of property that he owned in the area and his work for Alcoa in obtaining leases from other landowners and his retention or assignment to him of a royalty interest in connection with such leases. Plaintiffs' Exhibit No. 83 is an agreement between Mr. Appling and Lumar Gas Corporation in connection with which Mr. Appling granted to Lumar an easement to lay, construct, maintain, etc., a six inch pipeline for the transmission of natural gas over lands belonging to Mr. Appling in Jackson County, Texas. This agreement contained a provision obligating Lumar to accept for delivery and transportation, and to purchase or acquire for delivery and transportation, natural gas from wells situated in the area, which purchases were to be made only from the wells which were first approved and accepted by Mr. Appling; and if Lumar breached this particular covenant the right-of-way and easement would revert to Mr. Appling, together with the pipeline.

Plaintiffs further contend that as a result of the alleged conspiracy and combination resulting in the agreements

mentioned above, the defendants combined or conspired to boycott and concertedly refused to deal with plaintiffs Woods Exploration and Producing Company and Stanley C. Woods in that defendants refused to unitize any of plaintiffs' leases of various townsite lots with those of defendants in the Appling Field, or to buy or to transport plaintiffs' production from wells drilled by plaintiffs on these townsite lots; that defendants combined or conspired to control or attempt to control the terms and conditions of transporting plaintiffs' gas from the Appling Field for the purpose of blocking transportation of the gas from the Appling Field; and that F. E. Appling knew of the policy of defendants to prevent or restrict production from the townsite lots in the Appling Field, and pursuant to such knowledge and as a result of the rights he acquired in the right-of-way agreement, plaintiffs' Exhibit No. 83, he caused Lumar Gas Corporation to refuse to enter into a contract with Southeastern Pipe Line Company, and caused Lumar Gas Corporation to breach an agreement, if any, for transporting plaintiffs' gas over its line, and required Southeastern Pipeline Company to file condemnation proceedings for a right-of-way over F. E. Appling's land.

As pointed out above, plaintiff Southeastern Pipeline Company did construct its line and in connection therewith did obtain a right-of-way over Mr. Appling's land but had to resort to condemnation proceedings to do so.

With that factual background, we know turn to a consideration of what this Court considers to be its reasoning[7] and the law applicable thereto concerning this Court's conclusion that as a matter of law defendants are entitled to judgment.

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[7] In addition to those already stated in this Court's opinion in Woods Exp. & Prod. Co. v. Aluminum Co. of America, 284 F.Supp. 582 (S.D.Tex.1968).

At the outset of this case we are confronted with three questions: (1) What is the relevant market; (2) was there in this case monopoly power as defined by the Supreme Court, that is, power to control prices or exclude competition; and (3) was the monopoly power wilfully acquired and maintained or was it result of an historic accident?

A determination of the relevant market, "both as respects products and as concerns geographical area" needs to be made in actions for violation of section 2 of the Sherman Act. See Case-Swayne v. Sunkist Growers, Inc., 369 F.2d 449 (9th Cir. 1966). There is no question that natural gas is the relevant product market in the instant suit.

As to the relevant geographic market, this Court looks to the guidelines laid down by the Supreme Court in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). According to the *Brown Shoe* case, we must determine whether or not the Appling Field corresponds to the "commercial realities" of the industry and whether or not it is economically significant. It is true that the geographic market involved may be as small as a single metropolitan area or even one individual businessman. See Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). Considering the "commercial realities" of the oil and gas industry, however, this Court is convinced that the Appling Field does not constitute the relevant geographic market for natural gas in the area under consideration. All of the gas produced that was not used for the producer's own purposes was transported and sold in other areas. Additionally, due to the heavy regulations present in the natural gas industry,[8] neither Alcoa nor Crown, individually or jointly, or through F. E. Appling

[8] This Court has already discussed extensively the heavy regulation in the oil and gas industry. See Woods Exp. & Prod. Co. v. Aluminum Co. of America, 284 F.Supp. 582 (1968).

could establish any economic barriers which significantly impeded the entry of Woods or any other operators into the Appling Field. See Case-Swayne v. Sunkist Growers, *supra*.

The preceding point overlaps into the second question which concerns monopoly power. In this Court's opinion none of the alleged co-conspirators had the power to control prices or exclude competition in connection with the production of natural gas in the Appling Field. It is undisputed that Mr. Woods produced and marketed all of the gas that the Texas Railroad Commission permitted him to produce from the wells he drilled. The lack of monopoly power on the part of the defendants is apparent.

Plaintiffs rely heavily upon the case of Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), in which the Ninth Circuit draws a distinction between monopolization and attempts to monopolize. In attempts to monopolize, the Court rejected the view that probability of actual monopolization is an essential element of proof, where it stated:

> "Such a probability may be relevant circumstantial evidence of intent, but the specific intent itself is the only evidence of dangerous probability the statute requires — perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." Citing Swift & Co. v. United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518 (1906), and other cases.

The cases that *Lessig* relied on speak in terms of "dangerous probability" of the monopoly, etc., coming to pass. However, *Lessig* seems to go a step further. It holds that a finding of specific intent to monopolize is sufficient notwithstanding the probability of success. This Court refuses to take that additional step. There is no possibility, let alone probability, of monopolization in the Appling Field.

The *Lessig* case involves price fixing, which is far removed factually from the problem presented by this case. In addition, the circumstantial evidence in this record that would support a finding of specific intent on the part of the defendants is not persuasive to this Court.

In the final analysis, this Court must hold that the conduct of the defendants does not fit the definition of the offense condemned by section 2 of the Act. In addition, this Court holds that the Appling Field is not the relevant geographic market; that under the definition of the word "monopoly" these defendants as a matter of law lack the power to control prices or exclude competition; that whatever may have been placed within the control of the defendants in this case was the consequence of an historic accident (the discovery of the Appling Field); that their efforts to protect the natural gas they discovered by this historic accident was neither exclusionary, unfair, or predatory; and that they, and each of them, were not disempowered to defend their position fairly. This Court would again say that efforts before the Railroad Commission to prevent the drainage of gas from under the Appling Field by the small tract operators, including Woods, was fair. All of the other acts and conduct attempted to be proved by plaintiffs amounted to nothing more than conduct for which plaintiffs might have a cause of action under some tort theory.

Additionally, the agreements which plaintiffs contend brought about the monopoly and the combination in this case are the usual and customary types of agreements used in the oil and gas industry, that is, joint operating agreements, pooling agreements, unitization agreements, lease agreements, right-of-way agreements, and such agreements do not result in a limitation of the supply of gas in interstate commerce or any price fixing of gas. If the Sherman Antitrust Act were to be literally construed as plaintiffs contend,

it would condemn any type of joint operating agreement, or pooling agreement, or unitization agreement. In considering the "commercial realities" of this business, such would be an absurd result.[9]

Further, this Court is persuaded by the reasoning of the Supreme Court in the case of Appalachian Coals v. United States, 288 U.S. 344, 378, 53 S.Ct. 471, 77 L.Ed. 825 (1932). This case was an action brought to enjoin a combination alleged to be in restraint of interstate commerce in bituminous coal and an attempted monopolization of a part of that commerce in violation of Sections 1 and 2 of the Sherman Antitrust Act. The defendants, other than the Appalachian Coals, Inc., were 137 producers of bituminous coal in the Appalachian territory. These producers created an exclusive selling agency, Appalachian Coals, Inc., and all of the capital stock of that company was owned by the 137 producers in proportion to their production. The uniform contracts, separately made, of each of the defendant producers constituted the company as an exclusive agent for the sale of all coal which the producers mined out of the Appalachian territory. The government in the case contended that the plan adopted by these producers violated the Sherman Antitrust Act in that it eliminated competition between defendants themselves and also gave company power to substantially affect and control prices of bituminous coal in interstate commerce. Although factually the case is dissimilar, certainly the subject matter involved and the principles announced by the Supreme Court relating to

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[9] A discussion of this particular problem is found in an article by Hardwicke, Antitrust Laws, et al. v. Unit Operation of Oil or Gas Pools (1961); and an article by Searls, "Antitrust and Other Statutory Restrictions of Unit Agreements", Third Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation; and by Jacobs, Unit Operation of Oil and Fields, 57 Yale L.J. 1207 (1948).

that subject matter seem appropriately similar to the instant case. What the Supreme Court said about the Sherman Antitrust Act, what it was designed to do, and the necessity of looking at the particular industry involved support this Court's reasoning of the application of the Sherman Antitrust Act to the oil and gas industry and the activities of the defendants in the instant case. The Supreme Court reversed the trial court which had granted the injunction sought by the government, holding that the plan violated the Sherman Antitrust Act.

> "There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Antitrust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. * * * The decisions establish, said this Court in Nash v. United States, 229 U.S. 373, 376, 57 L.Ed. 1232, 1235, 33 S.Ct. 780, 'that only such contracts and combinations are within the act, as by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade.' (Citing numerous cases.) In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realties must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' * * * The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, * * * in relation to market prices and other

matters affecting the public interest in interstate commerce in bituminous coal."

Finally, this opinion and the Court's action in this case must be taken together with this Court's opinion and reasoning in Woods Exploration & Producing Co. et al., v. Aluminum Company of America et al., supra. Simply stated, the activities of the defendants in this case, when considered in conjunction with the discovery of, the production of, the transportation of, and the marketing of oil and gas, do not lend themselves to a cause of action under the Sherman Antitrust Act. There is no price fixing or attempt at price fixing involved. The product dealt with is one that is heavily regulated both in this case by the State of Texas and, with respect to marketing and price, by the Federal Power Commission. Efforts on the part of these agencies to protect the public in the conservation of this resource is necessary and, of course, monopolistic in a sense.

It would seem to this Court that courts should be reluctant to hold that the Sherman Antitrust Act applies to the type of agreements used in this case. They are the same type of agreements used in almost all activities in the oil and gas field, where the development of the product is regulated and the output is controlled, and the rights of the public are well protected. The ultimate recovery of the product is necessarily controlled, but not for the purpose of restraining trade or reducing competition of a character or a type contemplated by the antitrust laws.[10]

This Court will grant defendants' motion for judgment notwithstanding the verdict as to the jury's answer to Question No. Two. Defendants' attorneys will prepare an appropriate judgment, submit same to plaintiffs' attorneys for approval as to form, and the Court will immediately sign and enter same.

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[10] See Hardwicke, *supra*.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 28763 and 29487

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL.,

Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA, ET. AL.,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Texas

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(January 5, 1971) (438 F.2d 1286)

Before BROWN, Chief Judge, GOLDBERG and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge: This battle-scarred antitrust case and its antecedents, both lineal and collateral, have been in litigation without surcease, armistice, or truce since the early 1960's. The war today continues on two fronts — federal and state. Preserving for later the intimate factual details revealed in the myriad documents and testimony adduced below, we now sketch in the main historical contours of the present dispute.

The trouble among the parties centers around their activities in the Appling Natural Gas Field in Jackson and Calhoun Counties, Texas. Defendants, Aluminum Company of America ((Alcoa), Crown Central Petroleum Corporation (Crown), Lavaca Pipe Line Company (Lavaca), and alleged co-conspirators, F. E. Appling (Appling), Carl E.

Siegesmund (now Pocantico Oil & Gas Corporation), and Houston Pipe Line Company (Houston), control nearly 90% of the 4,000 acre surface of the Appling Field. Plaintiffs, Woods Exploration & Producing Company (Woods Exploration), Stanley C. Woods (Woods), and Southeastern Pipeline Company (Southeastern), have in combination an interest in various small tracts in the Field which comprise a much smaller percentage of the total acreage. Competition over the extraction of natural gas from this common field is at the heart of the dispute.

Production from the Appling Field is regulated by the Texas Railroad Commission, and its regulatory activities have given birth to several suits between the parties with regard to Commission production allowables. *Railroad Commission* v. *Aluminum Co. of America*, Tex. 1964, 380 S.W.2d rev'g Tex. Civ. App. 1963, 368 S.W.2d 818, *Railroad Commission* v. *Woods Exploration & Producing Co.*, Tex. 1966, 405 S.W.2d 313. In 1962 plaintiffs filed a state antitrust action alleging a combination or conspiracy on the part of defendants to eliminate or thwart plaintiffs from competing in the production of gas from the Appling Field. Shortly thereafter, in December 1962, plaintiffs filed the instant federal antitrust suit against defendants seeking injunctive relief and treble damages for alleged violations of the Sherman and Clayton Acts, 15 U.S.C.A. §§ 1, 2, 15, 26. By their complaint plaintiffs charged that defendants and their alleged co-conspirators had restrained trade in the production and marketing of natural gas from the Appling Field, 15 U.S.C.A. § 1,[1] and that defendants and their al-

[1] 15 U.S.C.A. § 1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

leged co-conspirators had monopolized, attempted to monopolize, or combined and conspired to monopolize the production and marketing of gas from the Field, 15 U.S.C.A. § 2.[2] Acts charged in furtherance of the allegations in both the state and federal suits were of two basic types: (1) the filing of false nomination forecasts by defendants with the Texas Railroad Commission so as to reduce plaintiffs' production allowables; and (2) the thwarting of plaintiffs' gas production by defendants' refusal to deal, and by defendants' harassment and interference with plaintiffs' operations. Defendants responded in the instant suit with a motion to dismiss for failure to state a claim, and, in the alternative, a motion for summary judgment. Both motions were overruled by then District Judge Ingraham, *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, S.D. Tex. 1963, 36 F.R.D. 107. Several months later the Texas Supreme Court held that plaintiffs' state suit allegations set forth a cause of action under state law and ordered the case to trial. *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, Tex. 1964, 382 S.W.2d 343. That case is still pending.

The present issues arose after the transferral of the federal action to the court of District Judge Singleton as a docket equalization measure in 1966. In *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, S.D. Tex. 1968, 284 F.Supp. 582, Judge Singleton, in a carefully written opinion, granted summary judgment for defend-

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[2] 15 U.S.C.A. § 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

ants with respect to plaintiffs' allegation of damages due to the filing of false nomination forecasts. The other allegations then proceeded to trial and were submitted to a jury upon special interrogatories. Although finding no restraint of trade in violation of section 1 of the Sherman Act, the jury found that defendants had monopolized, attempting to monopolize, or conspired to monopolize in violation of section 2, and awarded damages of $142,759 to Southeastern, and $500 to Woods Exploration. That verdict is reproduced in the margin.[3]

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[3]

VERDICT

In connection with your deliberations of the following questions, you are instructed that plaintiffs have the burden of proof.

QUESTION NO. ONE

Did defendants Alcoa and Crown enter into an illegal contract, combination, or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question "Yes" or "No."

Answer: No.

QUESTION NO. TWO

Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, or either of them, to monopolize any appreciable part of the trade and commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Questions Nos. One and Two "No," then you need not answer any of the following questions, but if you have answered Question No. One "Yes" or Question No. Two "Yes," or answered both Questions One and Two "Yes," then you will answer the following questions.

If you have answered Question Nos. One and Two "Yes,"

or either of them "Yes," then you will answer the following question:

QUESTION NO. THREE

3(a) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monoplize inquired abut in Questions Nos. One and Two, did Alcoa and Crown refuse to deal with Stanley C. Woods, individually, or Wods Exploration and Producing Company?

Answer this question either "Yes" or "No."

Answer Yes.

3(b) As a result of such illegal contract, combination, or conspiracy, or a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown employ the surveying patrnership of Johnston & Ford to make an incorrect survey of the Carancahua townsite property.

Answer this question either "Yes" or "No."

Answer: No.

3(c) As a result of such illegal contract, combination or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown harass or interfere with the operation of Woods Exploration & Producing Company in the drilling of wells on the townsite lots in the Appling Field.

Answer this question either "Yes" or "No."

Answer: Yes.

QUESTION NO. FOUR

Did Fred A. Wolcott sign plaintiff's Exhibit No. 85A?

Answer this question either "Yes" or "No."

Answer: No.

If you have answered Questions Nos. One and Two "Yes," or either of them "Yes," and if you have answered Question No. Four "No" then you will answer the following question:

QUESTION NO. FIVE

As a result of such illegal contract, comibnation, or conspiracy, or a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent Fred Wolcott from signing plaintiffs' Exhibit No. 85A?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Questions Nos. One and Two "Yes," of either of them "Yes," and if you have answered Question No. Four "No", then you will answer the following question:

QUESTION NO. SIX

As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent any other authorized representative of Lumar Gas Corporation, from entering into an agreement with plaintiffs Southeastern Pipeline Company, Stanley C. Woods, or Woods Exploration & Producing Company relating to the transportation of plaintiffs' gas from the Appling Field?

Answer this question either "Yes" or "No".

Answer: No.

QUESTION NO. SEVEN

What sum of money, if any, would fairly and reasonably compensate plaintiff Southeastern Pipeline Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any, were proximately caused by the illegal combination or conspiracy, or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Questions Nos. 4, 5, and 6, "No." then in connection with your answer to this Question No. Seven relating to damages, if any, you are not to take into consideration in connection with your deliberations of damages, if any, to Southeastern Pipeline Company, any testimony or evidence relating to the building by Southeastern Pipeline Company of a gas transmission pipeline from the Appling Field to con-

nect with the Tennessee Gas Transmission line, or the cost of any such line.

Answer this Question No. Seven by stating the amount in dollars and cents.

Answer: $142,759.00

*At the time the verdict was accepted by the court the foreman of the jury clarified that the figure should be $39,600. (Tr. 3343-44).

"1) Loss of pipe purchased & not used = $4,059."
"2) 6 wks. loss production on 16,000 mcf/day at 11¢/mfc gross ÷ 2 for net = $79,200*
"3) Loss of building 2nd pipeline $99,100."

QUESTION NO. EIGHT

What sum of money, if any, would fairly and reasonably compensate Woods Exploration & Producing Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any were proximately caused by the illegal combination or conspiracy or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Question 3(a) "No," then in connection with your deliberations concerning this question No. Eight, you will not take into consideration any testimony or evidence relating to the failure on the part of Alcoa and Crown to deal with Stanley C. Woods, individually, or Woods Exploration and Producing Company concerning the transportation of gas out of the Appling Field.

If you have answered Question 3(b) "No", then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to an incorrect survey or conflict in surveys in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

If you have answered Question 3(c) "No." then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to any harassment or interference with the operations of Woods Exploration & Producing Company in the Appling Field in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

You will answer this Question No. Eight by stating the amount in dollars and cents.

Answer: $500.00.

Finding this result unsupported by the evidence, the court below granted defendants' motion for judgment notwithstanding the verdict. Woods Exploration & Producing Co. v. Aluminum Company of America, S.D. Tex. 1969, 304 F.Supp. 845. Moreover, the court also issued an injunction enjoining plaintiffs from prosecuting their action then pending in the state court. The present appeal is a consolidation of plaintiffs' separate appeals from the decisions below. Disagreeing with the district court, we reverse and remand in part. In order to facilitate our explanation of our ruling, we consider in separate sections the various grounds raised on appeal.

I

Plaintiffs' first specification of error involves the partial summary judgment granted by the court below. In their complaint plaintiffs sought to recover as damages the loss of production from their wells in the Appling Field which had been occasioned by the entry of orders by the Texas Railroad Commission setting production allowables for plaintiffs' well sat levels lower than plaintiffs thought they should have received. Liability was alleged against defendants on the ground that the Railroad Commission orders had been based in part on false nomination forecasts and reports filed by defendants with the Commission. While the trial court found that it was "clear that there are disputed issues of fact on whether defendants actually conspired together and whether they deliberately filed the false nominations," it granted summary judgment for defendants, since it found that "even if plaintiffs' allegations in these respects are true, plaintiffs would still not be entitled to recover damages for these activities." We disagree.

Free competition among well producers is limited by Texas law in order to prevent waste. The allowable produc-

tion which each well in the Appling Field is permitted to produce is set monthly by order of the Texas Railroad Commission. The Commission is mandated to limit total production from the field to the reasonable market demand for gas made upon the field. See Tex. Rev. Civ. Stat. Ann. art. 6008 § 3(h). Each producing well is entitled to its fair share of the total allowable field production, an amount roughly proportional to the volume of gas in place under the tract on which the well is drilled. *Id.* § 12; see *Brown* v. *Humble Oil & Ref. Co.*, 1935, 83 S.W. 2d 935, 944.

While no statutory provision prescribes the procedure by which market demand is to be determined, the Commission has usually followed the procedures described in its Statewide Rule 31. Under that rule, market demand is determined primarily on the basis of Producer's Forecasts filed with the Commission by operators having wells in the field. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month. The nominations are totaled and, if the Commission concludes that their total accurately reflects market demand, the total becomes the field allowable. If the Commission disagrees with the forecasts, it is empowered to consider other factors, such as average production for the previous twelve months or nominations filed by purchasers of gas. See *Railroad Commission* v. *Woods Exploration & Producing Co.*, Tex. 1966, 405 S.W.2d 313.

After determining the total allowable for the field, the Commission has followed the practice of calculating the allowable for each well by application of a one-third — two-thirds proration formula. One-third of the field allowable is divided among the wells in the proportion to which the surface acreage attached to the well bears to the combined surface acreage of all wells in the field. Two-thirds of the field allowable is divided among the wells in the

proportion that each well bears to the total number of wells. This heavy emphasis upon the well factor has meant that producers with wells on small tracts have been permitted to extract far more gas than their acreage would justify. This effect is compounded by the fact that many wells on large tracts, although producing at full capacity, have been unable to produce the allowable assigned to them under the formula. As a result the amount they have been unable to produce has been allocated by the Commission to the small-tract wells not already producing at full capacity. Because of its inequitable effect on large tract owners, the one-third — two-thirds formula was declared invalid by the Texas Supreme Court. *Atlantic Ref. Co.* v. *Railroad Commission*, Tex. 1962, 346 S.W.2d 801. However, the formula retains its vitality in the Appling Field because of *Railroad Commission* v. *Aluminum Company of America*, Tex. 1964, 380 S.W.2d 599. The Texas Supreme Court there held that the formula could not be invalidated with respect to the Appling Field since large-tract owners were guilty of laches in attacking it. Although the court recognized the inequalities in the formula, it found this defect outweighed because "stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large."

It was in this context that plaintiffs alleged that defendants attempted to subvert the effects of the proration formula by filing false production forecasts to reduce the total field allowable. The trial court held that even if this allegation were true there would be no liability on the ground that the combined action by defendants to influence the Railroad Commission allowables did not violate the Sherman Act. It held that "any injury which *any* producer claims to have suffered because of the allowable assigned to him is an injury directly inflicted by the Railroad Com-

mission and not an injury inflicted by his fellow producers directly or through the exercise of any discretionary power conferred upon them by the State."

The trial court's theory rests in part on *Parker* v. *Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, where the Supreme Court held that a state agricultural marketing program was exempt from the Sherman Act, even though the program would have violated the Act if effected by a combination of private parties. Stressing that the program had been established under state legislation and was administered by a group appointed by the Governor and confirmed by the State Senate, the Court found that such direct governmental involvement was outside the pale of the proscriptions of the antitrust acts.

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350-51.

See also *United States* v. *Rock Royal Cooperative*, 1938, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446. Defendants assert that since their nominations become a part of the Commission's final production allowable orders, plaintiffs alleged injury is solely the result of state action. Defendants place principal reliance on our decision in *Okefenokee Rural Elec. Membership Corp.* v. *Florida Power & Light Co.*, 5 Cir. 1954, 214 F.2d 413. In Okefenokee the plaintiff brought an antitrust suit against Florida Light & Power Company and the City of Jacksonville, Florida, alleging that defendants

had unlawfully conspired to exercise exclusive control over the territory into which plaintiff was seeking to extend electric power lines. The only feasible route along which a new power line could be built paralleled Federal Highway 17. Plaintiff applied to the Florida State Road Department for permission to construct a line along the route. In order to defeat plaintiff's application, defendants constructed a "spite line" along the same route. Despite the fact that this line served no purpose other than to block plaintiff's application and could serve only two persons, defendants made a misleading argument before the Road Department that a line had already been constructed and that no new line should be built. Subsequently, the Road Department denied plaintiff's application. The district court dismissed the complaint for failure to state a claim, and this court affirmed, stating:

> "In brief, all of the damages averred in the complaint and all that are shown to be probable have been suffered or will accrue from the denial of the right to use this 'only feasible route,' which in turn results from the denial of a permit by the State Road Department of Florida, and from the rules and regulations governing the use of County roads by the Board of County Commissioners of Duval County, Florida. It is not claimed that either the State Road Department or the Board of County Commissioners was acting beyond its respective jurisdiction, or that for any other reason its action was invalid.
>
> "As so forcibly illustrated in Keogh v. Chicago & N. Y. Ry. Co., 260 U.S. 156, 163, 43 S. Ct. 47, 49, 67 L.Ed.183, 'Injury implies violation of a legal right.' The plaintiff had no legal right to use the state highway without a permit from the State Road Department, nor the county roads without permission of the Board of County Commissioners, and those authorities have decided against the plaintiff. So long as their decisions stand the plaintiff has not been legally injured, not-

withstanding it may have been irreparably damaged." 214 F.2d at 418.

We think *Okefenokee* is distinguishable and does not compel affirmance of the judgment below. It is true that both *Okefenokee* and the instant case involve state participation. That proposition however, only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject "the facile conclusion that action by any public official automatically confers exemption." *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 1 Cir. 1970, 424 F.2d 25, 30. In *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 4 Cir. 1959, 263 F.2d 502, 509, the court stated:

> "The teaching of Parker v. Brown is that the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subjct to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials. Rice v. Chicago Board of Trade, 331 U.S. 247, 253, note 4, 67 S.Ct. 1160, 91 L.Ed. 1468; United States v. Underwriters Association, 322 U.S. 533, 562, 64 S.Ct. 1162, 88 L.Ed. 1440; Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035. See also note in 95 Pa.L.Rev. 223, 229. Both such action must be state action, not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful."

See also Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense*, 66 Mich.L.Rev. 333, 340-43 (1967).

The concept of state action is not susceptible to rigid, bright-line rules. Each case must be considered on its own facts in order to determine whether or not the anti-competitive consequence is truly the action of the state. Bearing this in mind, we think that the exaggerated and misleading argument made by defendants in *Okefenokee* is fundamentally different from the filing of false factual data with regard to gas production. While in *Okefenokee* there was state action in the sense that the state can be said to have intended the resulting final order which adversely affected plaintiffs, the same cannot be said of the consequences of the Railroad Commission order at issue here. Phrasing the relevant criteria in other terms, the court in *Whitten* said:

> "Unlike Paddock, we do not read *Continental Ore* to mean that any action by a Canadian public official would have resulted in exemption. An anti-competitive practice may receive only the most cursory inspection by public officials, *see* Woods Exploration Co. v. Alcoa, 36 F.R.D. 107 (S.D. Texas 1963), or public officials may approve conduct without consideration or awareness of its anti-competitive aspects. *Cf.* Angle v. Chicago, St. Paul, Minneapolis and Omaha Rwy. Co., 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed. 55 (1893). The issue in such cases is not whether the action was in form 'governmental,' but the real decision makers were public officials or private business. *See* American Bar Association, 1955-1968 Antitrust Developments, 211-12 (1968)." 424 F.2d at 33, n. 8.

Thus, while in *Okefenokee* defendants presented misleading arguments, the pleadings did not allege falsification of facts. Further, the misstatements that were made were readily verifiable. Consequently, there was no allegation that the governing authority's decision to award the route to defendants was premised upon false information. The

adverse result with regard to plaintiffs can therefore be said to have flowed from state rather than private action. Conversely, in the case at hand there is an allegation that the Commission's production allowable order rested upon false facts adduced by defendants. There was, moreover, no opportunity for meaningful supervision or verification. Because of the amount and character of nomination predictions, the Railroad Commission of necessity must rely on the truthfulness of the gas producers. Such facts are usually in the exclusive control of those producers, so the final order of the Commission often must accept the nomination at face value. Hence, defendants' conduct here can in no way be said to have become merged with the action of the state since the Commission neither was the real decision maker nor would have intended its order to be based on false facts. Indeed, plaintiffs' basic claim is that the applicable production allowable formula which the state would have intended to utilize was subverted to the injury of plaintiffs by defendants' filing of false nomination forecasts. The situation is analogous to the filing of fraudulent statements with the Patent Office, which has been held to be evidence of an antitrust violation. *Walker Process Equip., Inc.* v. *Food Mach. & Chem. Corp.*, 1965, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247. See generally Costilo, *supra*, at 348-50.

Our case is also similar to *Continental Ore Oil* v. *Union Carbide & Carbon Corp.*, 1962, 370 690, 82 S.Ct. 1404, 8 L.Ed.2d 777, where the Supreme Court held that defendants' anticompetitive activities were not protected under the *Parker* rationale. There, a private firm acting as administrator of Canada's wartime rationing program used its discretionary power to exclude a competing processor of vanadium ore from the Canadian market. In defense of a private treble damage action, defendants asserted that the purchasing agent was acting as an administrator of the

Canadian Government and that the conduct was therefore privileged under *Parker*. The Supreme Court, stressing that there was no evidence that the Canadian Government had approved of the conduct of its agent, held that such conduct was subject to the Sherman Act. Again, in *UMW v. Pennington*, 1965, 381 U.S. 657, 671, 85 S.Ct. 1585, 14 L.Ed.2d 626, the Court reiterated this rationale and distinguished *Continental Ore* on the ground that in that case there had been no indication that any Canadian official "would have approved of joint efforts to monopolize the production and sale of vanadium. . . ."

Similarly, the Texas regulatory scheme at issue in this case does not sanction defendants' alleged conduct. While the scheme clearly provides for inhibitions upon competitive production, it is the Railroad Commission which is empowered to set production allowables. In doing so, the Commission of necessity must rely in part on nomination forecasts and reports filed by producers. But the discretion accorded the producers is circumscribed; their forecasts must be based on the volume of gas which each expects to be able to market from his wells the following month. Defendants were not clothed with discretion to subvert this scheme by filing unjustifiably low forecasts in order to reduce the production allowables. While state remedies may exist to correct this conduct, such activities also may state a cause of action under the federal antitrust laws.[4]

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[4] The Railroad Commission scheme itself provides that "nothing herein shall in any manner affect, alter, diminish, change or modify the anti-trust and/or monopoly statutes of this State, and that no provision of this Act shall in any manner directly or indirectly authorize a violation of such anti-trust and/or monopoly statutes. . . ." Tex.Rev.Civ.Stat.Ann. art 6049d, § 13. *Cf.* Woods Exploration & Producing Co. v. Aluminum Company of America, Tex. 1964, 382 S.W.2d 343.

Even if the conduct of defendants cannot be denominated state action and thus immunized under *Parker*, defendants assert that it is immunized by the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 1960, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464, and *UMW* v. *Pennington, supra*, which hold that joint efforts to influence public officials in the passage of laws are beyond the scope of the antitrust laws.

In *Noerr* the Supreme Court held that a railroad association's efforts to secure state legislation harmful to truckers who competed with the railroads were exempt from the Sherman Act, even though deceptive and intended to reduce competition. The decision in *Noerr* is premised on the principle that valid legislative or executive action which results in the restraint or monopolization of trade does not violate the Sherman Act. See *Parker* v. *Brown, supra.* Consequently, attempts to influence the legislative and executive branches must also be excluded from the Sherman Act because prohibiting such activity

> "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra*, 365 U.S. at 137.

Basic to *Noerr* is a belief that regulation of competition by the political process is legitimate and not proscribed by the Sherman Act, an enactment which is itself a political decision. For the political process to be effective there must be freedom of access, regardless of motive, to ensure

the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws." 365 U.S. at 139. See generally, Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 Harv. L. Rev. 847 (1968). Where these political considerations are absent the *Noerr* doctrine is inapplicable. See Note, *The Brakes Fail on the Noerr Doctrine*, 57 Calif. L. Rev. 518 (1969). The policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive purposes. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens. We think that the doctrine should not be extended unless the factors upon which *Noerr* rested are present and reqiure the same result. In *Trucking Unlimited* v. *California Motor Transport Co.*, 9 Cir. [No. 22,462, October 5, 1970] the Ninth Circuit refused to immunize under *Noerr* a scheme whereby trucking companies conspired to oppose before state and federal regulatory commissions all applications by competitors for the issuance, transfer, or registration of operating rights. Characterizing the licensing procedure as adjudicative, the court felt that the defendants were not seeking to influence a policymaking function; rather they were attempting to undermine a well defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies. Similarly, in the instant case there has been no attempt by defendants through the filing of false nominations to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the *Noerr* sense and thus participation in those rule-making proceedings would have been protected. But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not plead immunity

in their attempt to undermine its efficacy for anti-competitive purposes. In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc., supra,* 424 F.2d at 32, the court reached a similar conclusion with regard to a different subject matter:

> "But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By 'enforcement of laws' we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to us in a swimming pool gutter."

When Judge Ingraham below denied defendants' motion for summary judgment on the pleadings, he recognized the inapplicability of *Noerr* to the facts of this case:

> "As a second ground for dismissal the defendants argue that the allegedly false nominations were made in an attempt to influence governmental action, and therefore, as a matter of law, cannot be a violation of the antitrust legistlation. The case of Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1960), is deemed to be controlling. It was charged in that suit that the defendant railroads had conspired, through a concerted publicity campaign, to obtain the passage of legislation which was detrimental to the interests of the trucking business. The court found no basis for imputing to the Sherman Act a purpose to regulate *political* activity, and held that the railroads' activities were outside the ban of the Act 'at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.' 365 U.S. at 138, 81 S.Ct. at 530.
>
> "First, is the conduct complained of in the instant case political in nature? If the defendants were en-

> joined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any Constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from undertaking certain joint business behaivor. To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purpose of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr." 36 F.R.D. at 111-12.

See also *Woods Exploration & Producting Co.* v. *Aluminum Company of America*, Tex. 1964, 382 S.W.2d 343.

Defendants and the court below, however, argue that the decision in *Pennington*, decided subsequent to Judge Ingraham's opinion, has extended the *Noerr* immunity. We disagree. In *Whitten* the court faced a similar contention and found that *Pennington* posited no extension of the *Noerr* rationale:

> "*Noerr* was followed by *Pennington*, a case involving an effort by large mine operators and union officials to persuade the Secretary of Labor to prescribe higher minimum wages for companies selling coal to the TVA on long-term contracts. This effort at persuasion would seem to fall well within the *Noerr* immunity for attempts to influence the enforcement of laws. The Walsh-Healy Act, 41 U.S.C.A. § 35 *et seq.*, conferred considerable discretion on the Secretary of Labor to set wage levels in the public interest, and required the Secretary to observe the strictures of the Administrative Procedure Act, including notice, public hearing, and judicial review, in making wage rulings. 41 U.S.C. §§ 35(b), 43a; Costilo, AntiTrust's Newest Quagmire: The Noerr-Pennington Defense, 66 Mich.L.Rev. 333, 344-345 (1967). Nevertheless, the trial court instructed the jury that efforts to influence the Secretary were illegal

if part of a broader conspiracy to drive small mine-owners from business. Pennington v. United Mine Workers, 325 F.2d 804, 817 (6th Cir. 1963). The Court of Appeals took an even more restrictive view, holding that *Noerr* shielded only good-faith attempts to influence public officials, 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute.' 325 F.2d at 817. In rejecting these restrictive views of *Noerr*, the Supreme Court observed:

> 'Joint efforts to influence public officials do not violate the antitrust laws even through intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.' 381 U.S. 657 at 670, 85 S.Ct. 1585 at 1593, 14 L.Ed.2d 626.
>
> "Paddock [the plaintiff] seizes on this statement to buttress its position that efforts to influence any public official are exempt. In context, however, the Court's emphasis is not on the role of the public officials involved, but rather on the irrelevance of intent or conspiracy in applying the *Noerr* doctrine." 424 F.2d at 32-33 (footnote omitted).

We therefore find *Noerr-Pennington* inapplicable to the alleged filing of false nominations by defendants because this conduct was not action designed to influence policy, which is all the *Noerr-Pennington* rule seeks to protect. In light of this determination we hold that the abuse of the administrative process here alleged does not justify antitrust immunity. Consequently, we reverse the grant of summary judgment and remand the issue for an evidentiary determination of whether or not defendants in fact filed false nominations, and, if so, what damages plaintiffs sustained therefrom.

II.

Plaintiffs' next specification of error is that the trial court erred in granting a judgment notwithstanding the verdict for plaintiffs on the issue concerning monopolization. The plaintiffs had contended that the defendants violated the Sherman and Clayton Acts by refusing to deal with the plaintiffs regarding production and transportation of gas produced from plaintiffs' wells and by otherwise interfering with the plaintiffs' operations in the Appling Field. After the submission of special issues the trial court granted judgment for the defendants notwithstanding the following verdict of the jury:

> *"Question No. Two*
>
> Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, or either of them, to monopolize any appreciable part of the trade and commerce of drilling for, producing, and transporting gas from the Appling Field?
>
> Answer: Yes."

A. The Statute of Limitations

Defendants first argue, however, that regardless of any possible substantive error in granting the judgment n.o.v., plaintiffs are procedurally barred from recovery upon the affirmative answer given by the jury to the second interrogatory. Appellees entreat us to apply the applicable four-year statute of limitations[5] as a lethal blow to appellants' recovery.

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[5] 15 U.S.C.A. § 15b provides:

> "Any action to enforce any cause of action under section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

The statute applies, appellees contend, because the fact added in the 1965-1968 amended complaints — emphasizing section 2 monopolization — cannot relate back to the original complaint filed in 1962 — emphasizing false nominations. We scorn this approach, which would make us antediluvian in construing Fed. R. Civ. P. 15(c).[6] Chief Judge Brown has articulated for this court the liberality with which we should approach Rule 15(c):

> "The starting point for our analysis is F.R. Civ.P. 15(c), which deals with the relation back of pleading amendments. The Rule provides essentially that whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment will relate back to the date of the original pleading. The doctrine of relation back under Rule 15(c) is liberally applied today in the Federal Courts, especially if no disadvantage will accrue to the opposing party. 1A Barron & Holtzoff, Federal Practice and Procedure § 448 (Wright ed. 1960). Rule 15(c) is 'based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description

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[6] That rule provides:

> "(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

of the rights sought to be enforced.' 3 Moore, Federal Practice 15.15[2], at 1021.

"Of course, we are committed to the proposition that leave to amend should be given freely when justice requires. Longbottom v. Swaby, 5 Cir. 1968, 397 F.2d 45; Lone Star Motor Import, Inc. v. Citroen Cars Corp., 5 Cir. 1961, 288 F.2d 69.

"Clearly notice is the critical element involved in Rule 15(c) determinations. Cf. Tiller v. Atlantic Coast Line R.R. Co., 1945, 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465; New York Cent. & H.R.R. Co. v. Kinney, 1922, 260 U.S. 340, 43 S.Ct. 122, 67 L.Ed. 294. See generally 1A Barron & Holtzoff, Federal Practice and Procedure § 448 (Wright ed. 1960). This Court, too, has previously emphasized this. "The Federal rule on the "relation back" of amendments to pleadings, as embodied in Federal Rule 15(c) is permissive. As long as the amended complaint refers to the same transaction or occurrence that formed the basis for the original complaint and the defendant was put on notice of the claim by the first complaint, there will be no bar to amendment; even new defendants and new theories of recovery will be allowed.' Travelers Ins. Co. v. Brown, 5 Cir., 1964, 338 F.2d 229, 234." *Williams* v. *United States*, 5 Cir. 1968, 405 F.2d 234, 236-37 (footnote omitted).

This liberality is particularly persuasive in antitrust suits where there is ample opportunity for discovery and other pretrial procedures. Cf. *Western Geophysical Co. of America* v. *Bolt Assoc., Inc.*, D. Conn. 1969, 305 F.Supp. 1248, 1249 (" . . antitrust pleadings need not be in particular technical form as long as they present 'a short and plain statement of the claim showing that the pleader is entitled to relief' as required by Fed. R. Civ. P. 8. This is particularly true in a case such as this where there have already been several pre-trial conferences and extensive discovery has been taken"). The court below allowed the amendments,

and we think that this ruling was well within its discretion. A fair reading of the initial pleadings clearly shows that the plaintiffs, in addition to their false nomination claim, were alleging that the defendants monopolized the extraction of gas from the Appling Field. Appellees were neither surprised nor prejudiced, as their extensive fact-ferreting and myriad defense marshalling testifies. The compendious record in this case justifies our conclusion that no one was litigating in darkness. We therefore turn to the factual background necessary to assess the validity of the judgment n.o.v.

B. Factual Background

In 1949 defendants Alcoa and Crown entered into joint operating agreements covering an area of interest located within the territory now known as the Appling Field, a substantial portion of which was owned in fee by F. E. Appling. After confirming the desirability of the area as a drilling prospect, Alcoa obtained leases from Appling and engaged him to obtain oil and gas leases from the other landowners in the field. Subsequently, Carl Siegesmund (now Pocantico Oil Corporation) entered into the joint agreement for development of the field. By 1957 these parties owned or held leases on approximately 90% of the 4,000 acre surface of the Appling Field.

Alcoa caused its wholly-owned subsidiary Lavaca to construct a pipeline into the Appling Field to transport the gas produced from the field to Alcoa's aluminum smelter at Point Comfort, Texas. On July 14, 1955, Alcoa, Crown, and Pocantico entered into a gas marketing agreement with Houston Pipe Line Company. This company purchased gas produced in the Appling Field owned by Alcoa, Crown, and Pocantico, accepted delivery at Point Comfort, and transported a portion of such gas to Monsanto Chemical Company in Texas City and Chocolate Bayou, Texas.

In 1959 plaintiff Wood became interested in the Appling Field, especially that portion known as the Carancahua Beach Townsite located in Calhoun County, which generally consisted of small, vacant town lots. The acreage of these lots amount to considerably less than one-half of one percent of the entire acreage of the Appling Field. Around 1960 plaintiff Woods Exploration, the stock of which is wholly owned by plaintiff Woods, began leasing up these small lots. After defendants refused to unitize or pool drilling operations, plaintiffs commenced their own drilling, and completed nine or ten gas wells. Woods and Woods Exploration, in order to sell or transport their gas production from the wells, attempted to utilize the pipeline of Alcoa's subsidiary, Lavaca, the only available outlet. The evidence shows and the jury found that these efforts were unsuccessful largely because Lavaca refused to deal with plaintiffs. Plaintiffs then formed Southeastern Pipeline Company to transport the gas. Subsequently, Lumar Gas Pipeline Corporation (Lumar) and Appling executed a right-of-way agreement whereby Lumar was enabled to construct a pipeline for the transmission of natural gas over lands belonging to Appling. This agreement contained a provision obligating Lumar to accept for delivery and transportation, and to purchase or acquire for delivery or transportation, natural gas from wells situted in the area, which purchases were to be made only from the wells which were first approved and accepted by Appling. When Woods, Woods Exploration, and Southeastern attempted to utilize the Lumar Pipeline, they were rebuffed. In particular, Lumar, relying on its obligation to Appling, refused to execute a contract with Southeastern which had been in the process of negotiation. Moreover, during this period Appling refused to grant Southeastern a pipeline easement across his land unless an overriding royalty was paid on any gas transported through the pipeline across his land. South-

eastern eventually was forced to file condemnation proceedings for a right-of-way over Appling's land and to construct its own line to transport gas from the Woods' wells in the Appling Field to the pipeline of Tennessee Gas (now Tenneco). Production and transportation of gas from the Woods' wells began on January 1, 1961. As gas was produced it was sold to Southeastern, which transported the gas to the Tenneco line, which further transmitted the gas to Southeastern's customer, Bayou Hydrocarbons Company in Houston, Texas.

Plaintiffs' basic allegations arising out of these facts were that defendants violated the antitrust laws by refusing to deal with plaintiffs so that plaintiffs could drill for, transport, and market their gas, and by harassing plaintiffs' efforts to drill and complete their wells. Thus, plaintiffs allege that they were injured by (1) defendants' refusal to transport plaintiffs' gas through the Lavaca pipeline, (2) defendants' conspiracy with Appling to prevent either the transportation of gas through the Lumar pipeline or the grant of a reasonable pipeline easement to Southeastern; (3) defendants' refusal to unitize or pool; and (4) defendants' harassment of plaintiffs in connection with plaintiffs' drilling operations.

After the jury verdict for plaintiff's, the court granted defendants' motion for judgment n.o.v. It reasoned as follows:

> "In the final analysis, this Court must hold that the conduct of the defendants does not fit the definition of of the offense condemned by section 2 of the Act. In addition, this Court holds that the Appling Field is not the relevant geographic market; that under the definition of the word "monopoly" these defendants as a matter of law lack the power to control prices or exclude competition; that whatever may have been

placed within the control of the defendants in this case was the consequence of an historic accident (the discovery of the Appling Field); that their efforts to protect the natural gas they discovered by this historic accident was neither exclusionary, unfair, or predatory; and that they, and each of them, were not disempowered to defend their position fairly. This Court would again say that efforts before the Railroad Commission to prevent the drainage of gas from under the Appling Field by the small tract operators, including Woods, was fair. All of the other acts and conduct attempted to be proved by plaintiffs amounted to nothing more than conduct for which plaintiffs might have a cause of action under some tort theory.

Additionally, the agreements which plaintiffs contend brought about the monopoly and the combination in this case are the usual and customary types of agreements used in the oil and gas industry, that is, joint operating agreements, pooling agreements, unitization agreements, lease agreements, right-of-way agreements, and such agreements do not result in a limitation of the supply of gas in interstate commerce or any price fixing of gas. If the Sherman Antitrust Act were to be literally construed as plaintiffs contend, it would condemn any type of joint operating agreement, or pooling agreement, or unitization agreement. In considering the "commercial realities" of this business, such would be an absurd result.

* * * *

Finally, this opinion and the Court's action in this case must be taken together with this Court's opinion and reasoning in Woods Exploration & Producing Co. et al., v. Aluminum Company of America et al., supra. Simply stated, the activities of the defendants in this case, when considered in conjunction with the discovery of, the production of, the transportation of, and the marketing of oil and gas, do not lend themselves to a cause of action under the Sherman Antitrust Act. There is no price fixing or attempt at price fixing in-

volved. The product dealt with is one that is heavily regulated both in this case by the State of Texas and, with respect to marketing and price, by the Federal Power Commission. Efforts on the part of these agencies to protect the public in the conservation of this resource is necessary and, of course, monopolistic in a sense.

It would seem to this Court that courts should be reluctant to hold that the Sherman Antitrust Act applies to the type of agreements used in this case. They are the same type of agreements used in almost all activities in the oil and gas field, where the development of the product is regulated and the output is controlled, and the rights of the public are well protected. The ultimate recovery of the product is necessarily controlled, but not for the purpose of restraining trade or reducing competition of a character or a type contemplated by the antitrust laws." 304 F.Supp at 850-52 (footnotes omitted).

C. Possible Exemption from Antitrust Laws

The district court's opinion seemed to imply that because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws. We cannot agree with this determination of the trial court. True the production, gathering, and transportation of natural gas in the Appling Field is subject to regulation by the Texas Railroad Commission. See, e.g., Tex. Rev. Civ. Stat. art. 6008; 15 U.S.C.A. § 717 (b). The Commission is empowered to regulate competition in order to mitigate its abuse. But this state regulation does not mean that there is no room for antitrust policies to operate. Our antitrust laws constitute our economic magna carta, designed to protect against predatory oppression. Conceived as such a writ they must not be facilely negated. As the Supreme Court has reminded us, "immunity from antitrust laws 'is not lightly implied.'" *United States* v. *First City Nat'l Bank,*

1967, 386 U.S. 361, 368, 87 S.Ct. 1088, 18 L.Ed.2d 151, quoting *California* v. *FPC*, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54. We therefore think it incumbent upon this court to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive. As Judge Wright expressed the matter in *Northern Nat. Gas Co.* v. *FPC*, D.C. Cir. 1968, 399 F.2d 953, 959:

> "Despite a continuing debate, it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same — to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits. Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other."

Therefore, while we cannot hold that actions taken pursuant to Commission regulations violate the antitrust laws, we can hold that actions taken to subvert the Commission scheme for anti-competitive purposes are subject to strictures of the antitrust laws. See Tex. Rev. Civ. Stat. Ann. art. 6049d, § 13; *Woods Exploration & Producing Co.* v. *Aluminum Company of America*, Tex. 1964, 382 S.W.2d 343; cf. *Silver* v. *New York Stock Exchange*, 1963, 373 U. S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389. Considering this distinction, we think that plaintiffs have alleged conduct which is not immunized solely because of regulation by the Texas Railroad Commission. The state regulatory scheme has estab-

lished quotas for the production of natural gas from the Appling Field. Plaintiffs have alleged that the defendants attempted to subvert this scheme by agreeing among themselves to obstruct and frustrate the extraction of gas by plaintiffs so as to preserve the gas pool for defendants. While the Commission, through its production allowables, could restrain defendants' production of gas, it could not prevent defendants from inhibiting extraction by plaintiffs. Moreover, we are reinforced in our view that this conduct is not immune from federal antitrust regulation by virtue of the Texas statutory scheme itself, which recognizes the continued vitality of the antitrust laws within the natural gas industry. Tex. Rev. Civ. Stat. Ann. art. 6049d, § 13.

D. Sherman Act Section 2

The trial court held that even if the antitrust laws did apply, plaintiffs' allegations did not support a violation of section 2 of the Sherman Act. We now consider that ruling. In doing so we bear in mind that on reviewing a judgment notwithstanding the verdict we must "consider all of the evidence — not just that evidence which supports the nonmover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion." *Boeing Co.* v. *Shipman,* 5 Cir. 1969, 411 F.2d 365, 374 (en banc).

Section 2 of the Sherman Act makes it unlawful to:

> ". . . monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. . . ."

Dispensing first with preliminaries, we think it obvious that the production, transportation, and sale of natural gas constitutes a "part of" "trade or commerce" for purposes

of the Sherman Act. See *United States* v. *El Paso Nat. Gas Co.*, 1964, 376 U.S. 651, 657, 84 S.Ct. 1044, 12 L.Ed.2d 12; *United States* v. *Grinnell Corp.*, 1966, 384 U.S. 563, 573, 86 S.Ct. 1698, 16 L.Ed.2d 778. Nor do we tarry long over defendants' argument that the complained of activities were intrastate without adverse impact upon interstate commerce. Crown and Alcoa did business in states other than Texas and were engaged in the production, transportation, and sale of gas from the Appling Field which entered into the flow of interstate commerce. The effect on interstate commerce need not have been gargantuan nor precisely mathematecized. It is sufficient if it is more than merely inconsequential. *California* v. *Lo-Vaca Gathering Co.*, 1965, 379 U.S. 366, 85 S.Ct. 486, 13 L.Ed.2d 357; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 1948, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328; *Cherokee Lab., Inc.* v. *Rotary Drilling Services, Inc*, 5 Cir 1967, 383 F2d 97, *cert. denied*, 1968, 390 U.S. 904; *Utah Gas Pipelines Corp.* v. *El Paso Nat. Gas Co.*, D. Utah, 1964, 233 F.Supp. 955.

The difficult question is whether defendants monopolized, attempted to monopolize, or conspired to monopolize within the intendment of section 2. The offense of monopolization has been described by the Supreme Court to consist of the following elements:

> "[T]he offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp., supra*, 384 U.S. at 570-71.

The related offenses of attempting to monopolize and combining or conspiring to monopolize do not require that

actual possession of monopoly power be shown before the cause of action is established. However, they do require evidence of a specific intent to destroy competition or to build a monopoly. *Times-Picayune Pub. Co.* v. *United States*, 1953, 345 U.S. 594, 626, 73 S.Ct. 872, 97 L.Ed. 1277; *Lewis* v. *Pennington*, 6 Cir. 1968, 400 F.2d 806, *cert. denied*, 1968, 393 U.S. 983; *United States* v. *Consolidated Laundries Corp.*, 2 Cir. 1961, 291 F.2d 563. There currently exists some dispute over whether either attempts to monopolize or conspiracies to monopolize require proof of the relevant market or ability to achieve monopoly power.[7] Since special issue number 2 would have permitted the jury to find a violation of any one of the three elements of Sherman Act section 2, plaintiffs and defendants devote sizeable portions of their arguments to this question. We do not resolve this conflict over the requisites of conspiracies or attempts, for we find that plaintiffs have satisfied the evidentiary requirements of the offense of monopolization. Disagreeing with the trial court, we hold that the Appling Field clearly constitutes the relevant geographic market, and that the jury

[7] Thus, cases have seemingly split as to whether a dangerous probability of monopolization is an essential element of proof. Compare Bernard Food Indus., Inc. v. Dietene Co., 7 Cir. 1969, 415 F.2d 1279, 1284, cert. denied, 1970, 397 U.S. 912; Cliff Food Stores, Inc. v. Kroger, Inc., 5 Cir. 1969, 417 F.2d 203; Hiland Dairy, Inc. v. Kroger Co., 7 Cir. 1968, 402 F.Td 968, cert. denied, 1969, 395 U.S. 961, with Lessig v. Tidewater Oil Co., 9 Cir., 327 F.2d 459, cert. denied, 1964, 377 U.S. 993; United Staes v. Consolidated Laundries Corp., supra. See generally Bleech, Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market," 38 Geo. Wash. L. Rev. 215 (1969). Other cases have held that the requisite specific intent at least comprehends an intent "to gain control over some relevant market or to exclude competitors therefrom." AFL v. NFL, D.Md. 1962, 205 F.Supp. 60, aff'd, 4 Cir. 1963, 323 F.2d 124. Compare Bowl America, Inc. v. Fair Lanes, Inc., D.Md. 1969, 299 F.Supp. 1080, 1093, with United States v. Consolidated Laundries, Corp., supra.

could find that defendants possessed sufficient power in that market to monopolize the production of natural gas.

Defendants argue that the Appling Field cannot constitute a relevant market for it is a source of supply rather than a market. This argument, however, fails to recognize that "relevant market" is simply a short hand phrase used to describe "the arena within which the strength of competitive forces is measured." P. Areeda, *Antitrust Analysis* ¶ 201, at 71 (1967). It does not necessarily mean the selling place.

In *United States* v. *Pabst Brewing Co.*, 1966, 384 U.S. 546, 86 S.Ct. 1665, 16 L.Ed.2d 765, the Supreme Court reversed a lower court dismissal under § 7 of the Clayton Act, 15 U.S.C.A. § 18, grounded upon failure to prove the relevant market. The Court's language is instructive:

> "Apparently the District Court thought that in order to show a violation of § 7 it was essential for the Government to show a "relevant geographic market" in the same way the corpus delicti must be proved to establish a crime. But when the Government brings an action under § 7 it must, according to the language of the statute, prove no more than that there has been a merger between two corporations engaged in commerce and that the effect of the merger may be substantially to lessen competition or tend to create a monopoly in any line of commerce *"in any section of the country."* (Emphasis supplied.) The language of this section requires merely that the Government prove the merger may have a substantial anticompetitive effect somewhere in the United States — "in *any* section" of the United States. This phrase does not call for the delineation of a "section of the country" by metes and bounds as a surveyor would lay off a plot of ground.[3] The Government may introduce evidence which shows that as a result of a merger competition may be substantially lessened throughout the country, or on the other hand it may prove that competition may be substantially

> lessened only in one or more sections of the country. In either event a violation of § 7 would be proved. Certainly the failure of the Government to prove by an army of expert witnesses what constitutes a relevant "economic" or "geographic" market is not an adequate ground on which to dismiss a § 7 case. Compare United States v. Continental Can Co. 378 US 441, 458, 12 L ed 2d 953, 964, 84 S Ct 1738. Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States." 384 U.S. at 549-550 (footnote omitted).

Cf. *United States* v. *Grinnell Corp., supra,* 384 U.S. at 573 (section 7's use of "any section of the country" equated to section 2's "any part of the trade or commerce among the several states").

Plaintiffs do not argue that defendants possess or have attempted to possess monopoly power over the marketing of natural gas. They instead contend that defendants possess monopoly power over the extraction of gas from the Appling Field. An essential fact in the natural gas industry is that adjoining land owners usually extract gas from a common gas reservoir. Thus, if one producer can inhibit or eliminate the extraction of gas by another, the inhibitor can prolong the life of the field and enhance his own future production figures. With regard to extraction of gas — which is at the heart of plaintiffs' complaint — the Appling Field therefore is the relevant area of competition. It is the "part" of "trade or commerce" with regard to which we must measure the power to exclude competitors. See

American Tobacco Co. v. *United States*, 1946, 328 U.S. 781, 809, 66 S.Ct. 1125, 90 L.Ed. 1575.

Directly in point is the recent decision in *Denver Petroleum Corp.* v. *Shell Oil Co.*, D.Colo. 1969, 306 F. Supp. 289. In *Denver Petroleum* plaintiffs alleged that defendant oil company had attempted to monopolize and had monopolized the purchase of crude oil and condensate in a particular oil production area by refusing to transport oil other than its own in its pipeline. With regard to the relevant market, the court stated:

> "The next matter for consideration is the problem of the so-called "relevant market". Our conclusion has been that for purposes of this case the relevant geographic area is Rio Arriba County, New Mexico, and particularly what has been called the Basin-Rio Arriba oil production area included therein. While it is likely that defendant's monopoly power extends as far as its illegal operation of the pipeline as private carriers is effective to isolate the crude supply, there is no real need to expand consideration to the other areas of Northwest New Mexico. Plaintiffs would have us believe that they propose to operate in the Basin-Rio Arriba oil production area; if there is not a monopoly there it matters not in this case that there might be monopoly power in other areas, and if there is, as we have found, a monopoly in that area, it similarly makes no difference, under our approach, that the monopoly may encompass a larger area.
>
> Defendant would have us engage in market analysis, considering the full breadth of "economic and competitive realities," to determine that the market structure is, if not nationwide, at least as broad as the entire Four Corners region. And there is no doubt whatever that Shell does not possess a monopoly of purchasing in any of these larger areas considered as a whole.
>
> However, in our opinion, such analysis is unnecessary in this case and the "relevant market" is in that

> sense irrelevant. We have here a practice illegal in itself, operation of the pipelines as private carriers, a purpose and the obvious natural effect of which was to exclude nonlocal competition from the crude supply which Shell badly needed. When one must "look" for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude competition and control prices, there appears no real need to go further." 306 F.Supp. at 304.

Likewise in the present case we can look to the Appling Field and see the existence of a practice "the obvious natural effect of which was to eliminate or thwart competitive extraction of gas from the Field by plaintiffs. Nor does it matter that this circumscribed area of competition is small, or that the effect on the public at the place of ultimate sale may be minor. In *Klor's* v. *Broadway-Hale Stores,* 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741, the Supreme Court considered the sufficiency of allegations under sections 1 and 2. There plaintiff, a single retail store operator, contended that defendants had conspired to boycott and to refuse to deal by not selling certain brands to plaintiff. The lower courts had dismissed the complaint because it had been shown that there were hundreds of other retailers near Klor's who sold many of the brands defendants refused to sell to Klor's. Thus, the courts reasoned, "there was no charge or proof that by any act of defendants the price, quantity, or quality, offered the public was affected." The Supreme Court reversed:

> "This combination takes from Klor's its freedom to buy appliances in an open competitive market and

drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly,' " whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' International Salt Co. v. United States, 332 U.S. 392, 396, 92 L ed 20, 26, 68 S Ct 12." 359 U.S. at 213 (footnotes omitted).

We therefore hold that the trial court erred in finding that the Appling Field was not a relevant market. Nor do we hold, as defendants contend, that the issue of the appropriate relevant market should at least have been sent to the jury. In its instructions to the jury the court assumed as a matter of law that the Appling Field was the relevant market. Following the verdict the trial court felt compelled to change this ruling and granted judgment n.o.v. in part, reasoning that as a matter of law the Appling Field was not the relevant market. Since the pertinent facts are not in dispute, we hold that the Appling Field is a relevant market for determining monopoly power under section 2 and do not remand this issue for trial.

Viewing the Appling Field as the relevant market, we think the jury was warranted in finding that defendants possessed monopoly power in that Field. Defendants con-

tend first that the evidence demonstrates that plaintiffs in fact were able eventually to produce their production quota[8] so that defendants' lack of monopoly power is apparent. We disagree. While plaintiffs did eventually manage to produce their production quota, they incurred both increased expenditures and lost production due to defendants' conduct. More important, we do not think that absolute success in excluding competition is an essential element to proving monopoly power under section 2. It is enough that defendants' market position is such that they have substantial power to thwart competition. The defendants here and their alleged co-conspirators owned or leased approximately 90% of the Appling Field. Their holdings were so situated that they could block transportation from competing wells. We think that the jury could find on this state of the facts that defendants possessed monopoly power in the Appling Field within the meaning of the Act.

Mere monopoly power in a relevant market, however, is not sufficient in itself to constitute a violation of section 2. *Grinnell* teaches us that monoply power is actionable only if it is willfully acquired or maintained. The instant case does not involve such obvious violations as price fixing or allocation of markets. Nevertheless, prior cases have amply demonstrated that conduct designed to barricade access to markets or inhibit production can constitute a proscribed means of monopolization. Judge Gewin, speaking for this court in *North Texas Producers Ass'n* v. *Young*, 5 Cir. 1962, 308 F.2d 235, 241, *cert. denied*, 1963, 372 U.S. 929, summarized some of the types of conduct which have been held violative of the Act:

> "Violations of the act have been manifested in numerous ways as illustrated by the following cases: The act

[8] Of course, plaintiffs allege that this quota was unjustifiably parsimonious due to defendants' filing of false nomination forecasts.

of a group of motion picture distributors who, together, have a monopoly in the distribution of pictures, who combined and conspired to refuse to furnish films to a particular exhibitor, to cause a breach of contracts with him and to prevent him from carrying on his business, Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308; a conspiracy of competing appliance retailers and manufacturers and distributors of appliances who agreed not to sell appliances to the plaintiff, Klor's, or to sell only at discriminatory prices or on unfavorable terms, even though there were opportunities to buy in a competitive market, Klor's, Inc. v. Broadway-Hale Stores, Inc., Admiral Corp., et al., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741; the exclusion by a board of trade having monopolistic power, of an owner of a warehouse from a tobacco market, American Federation of Tobacco Growers, Inc. v. Neal, (4 Cir., 1950) 183 F.2d 869; exclusion of a competitor from a building and an appropriate market for business opportunities without justifiable business reasons, Gamco, Inc. v. Providence Fruit & Produce Building, Inc., (1 Cir., 1952) 194 F.2d 484; an agreement of brewers of beer not to sell to a particular person or class of persons, Johnson v. Schlitz, (D.C. E.D.Tenn., 1940) 33 F.Supp. 176; agreement among competitors to fix minimum resale prices of their products, Kiefer-Stewart Co v. Joseph E. Seagram & Sons, (1951) 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219. There are many other cases which present a myriad of situations demonstrating ingenuity, disguise, intrigue and subterfuge to avoid the appearance of law violation."

We think that plaintiffs' allegations come within the spirit and rationale of these cases. Basically, plaintiffs contend that defendants violated section 2 by (1) refusal to unitize or pool; (2) refusal to transport plaintiffs' gas; (3) harassment in drilling; and (4) refusal to grant a right-of-way to Southeastern. In essence, plaintiffs paint a picture of concerted action by defendants to restrain,

hinder, or eliminate plaintiffs' extraction of gas from the common gas reservoir shared with defendants. We are not saying that pooling, unitization, and joint operating agreements are in themselves maligned under the Sherman Act, but even if we consider that the Act impliedly immunizes these collective activities as benign in themselves, they cannot be the instruments of economic predatism or oppression. Buying and selling are innocent activities in and of themselves, but each can be converted into an antitrust malefaction. We think that the pattern of conduct alleged here may be held unlawful under the Sherman Act. Cases involving concerted refusals to deal,[9] see *Klor's* v. *Broad-*

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[9] Defendants spend a good deal of time arguing that as a matter of law there can be no finding of a refusal to deal by Lavaca. They first argue that since Lavaca is a wholly-owned subsidiary of Alcoa, does not carry gas for anyone else, and does not compete with Alcoa, any refusal was merely a unilateral refusal. Secondly, defendants argue that there was insufficient evidence to show that Woods tendered his gas to Lavaca. Conversely, plaintiffs argue that Lavaca did carry gas for other companies in addition to Alcoa; moreover, plaintiffs contend that under Texas law Lavaca is both a common purchaser, Tex. Rev. Stat. Ann. art. 6049a and a common carrier, Tex. Rev. Civ. Stat. Ann. art. 6050, and thus is under an obligation to carry plaintiffs' gas. Finally, plaintiffs allege that the evidence as to Woods' offer, while disputed, has been resolved by the jury in favor of plaintiffs.

We quickly dispose of the issue of the sufficiency of the evidence. There was here sufficient evidence upon which the jury might have found both that Woods tendered his gas which was then refused by Lavaca and that Lavaca carried gas for others. Likewise, we find without merit defendants' argument that the refusal to transport gas was merely a lawful unilateral refusal by Lavaca. Defendants first fail to realize that while section 1 or section 2 conspiracies evidenced by refusal to deal do require a combination or conspiracy between two or more entities, section 2 monopolization or attempted monopolization does not. Therefore, even if the refusal is viewed as the act of Alcoa, it would furnish a basis for finding monopolization or attempted monopolization if it constitutes either a "willful maintenance" of monopoly power or a specific intent to obtain monopoly power. See National Screen Service Corp. v. Poster Ex-

way-Hale Stores, supra; Times-Picayune Publishing Co. v. *United States, supra; National Screen Service Corp.* v. *Poster Exchange, Inc.*, 5 Cir. 1962, 305 F.2d 647, conspiracy to deny access to markets, see *North Texas Producers Ass'n* v. *Metzger Dairies, Inc.*, 5 Cir. 1965, 348 F.2d 189, *cert. denied*, 1966, 382 U.S. 977; *Premier Electrical Constr. Co.* v. *Miller-Davis Co.*, 7 Cir. 1970, 422 F.2d 1132, and refusal to permit utilization of facilities, *Silver* v. *New York Stock Exchange, supra; Denver Petroleum Corp.* v. *Shell Oil Co., supra*, support the conclusion here that defendants violated section 2 of the Sherman Act. At least the jury could so find.

E. Damages

We next turn to the issue of damages. At trial the jury awarded Woods Exploration $500 and Southeastern $142,759.[10] Defendants claim this was error by making the following argument.

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change, Inc., supra, 305 F2d at 651-52; Fiumara v. Texaco, Inc., E.D. Pa. 204 F.Supp. 544, 552, aff'd, 3 Cir. 1962, 310 F.2d 737. However, we think that in any event the alleged action by Lavaca could not be characterized as a unilateral refusal to deal. Judge Thornberry has stated the rule with regard to section 1, and we feel it is equally applicable to conspiracies under section 2:

> "It is settled that 'common ownership and control does not liberate corporations from the impact of the antitrust laws.' Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 1951, 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219, and subsidiary or affiliate corporations are capable of of section 1 of the Sherman Act. *See, e.g.*, Timken Roller Bearing Co. v. United Sattes, 1951, 341 U.S. 593, 598, 71 S.Ct. 971, 95 L.Ed. 1199; United States v. Yellow Cab Co., 1947, 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010." Cliff Food Stores Inc. v. Kroger, Inc., supra 417 F.2d at 205-06.

Whether or not Lavaca was a common carrier under Texas law, the jury would be warranted in finding an illegal conspiracy to monopolize the field, evidenced in part by a refusal to transport plaintiffs' gas.

[10] See note 3, *supra*, where the jury's answers to the special issues are reproduced in full.

> "Furthermore, under the uncontroverted evidence all of the Appling Field gas wells and Appling Field gas involved was Woods' gas and not Southeastern's, and all dealing with reference to transportation of such gas from such wells was with Woods. Any refusal to deal by Appellees was limited by Question No. 3(a) to Woods or Woods Exploration & Producing Company and any damage award from refusal to deal or causing refusal to deal was limited by the jury answer to Question No. 8 to $500 to Woods Exploration & Producing Company."

We first note that, contrary to defendants' contentions, the answer to Question 3(a), which found that Alcoa and Crown refused to deal with Woods and Woods Exploration, does not preclude any damage award to Southeastern. Damages to Southeastern were predicated upon a finding that Lumar refused to transport plaintiffs' gas because of illegal conduct by defendants and Appling after the formation of Southeastern. The affirmative answer to Question 5 constitutes a jury finding that defendants did indeed prevent Lumar, acting through Wolcott, from consummating its deal with Southeastern despite the fact that Question 4 determined that Lumar's president never signed a contract. The affirmative answer to Question 3(a) merely constitutes an additional finding that defendants also refused to deal with Woods and Woods Exploration, based upon the evidence tending to show that Lavaca refused to transport Woods' gas prior to the formation of Southeastern. In Question 8 the jury found that the refusal to deal in Question 3(a) damaged Woods to the extent of $500. In Question 7 it found that defendants' conduct with respect to Lumar in Question 5 damaged Southeastern to the extent of $142,759. The latter damages are clearly supported by the evidence, consisting of (1) the cost of pipe which had been purchased by Southeastern to connect Woods' wells to

Lumar's line, and which could not be used since Lumar refused to deal; (2) the unnecessary expense incurred by Southeastern in building a second pipeline running alongside the Lumar line; and (3) the loss by Southeastern of the sale of 16,000 m.c.f. of gas per day occasioned by six weeks' loss of gas production due to Lumar's illegally-inspired refusal to deal. We therefore reject defendants' assertion that either damages must be limited to $500 or at least resubmitted to a jury.

On the other hand, plaintiffs argue that the trial court erred in eliminating from the jury's deliberations any possible damages which might have arisen from the lost opportunity to participate in the construction of a liquid extraction plant. Plaintiffs introduced evidence to show (1) that Southeastern and Lumar reached an agreement whereby Lumar would erect an extraction plant on its pipeline, and Southeastern would both share in the investment and participate in the profits; (2) that defendants thwarted this agreement to the damage of Southeastern; (3) that Southeastern reached similar tentative agreements Graver Oil & Gas Equipment Company and Marler Construction Company for the erection of a plant on the Southeastern pipeline; and (4) that defendants frustrated these agreements to the damage of Southeastern. The trial court, in its charge to the jury, excluded any consideration of damages flowing from the failure to construct an extraction plant.

This ruling was apparently based upon the fact that in a treble damage suit under § 4 of the Clayton Act, 15 U.S.C.A. § 15, plaintiff must allege and prove that he has been "injured in his business or property" by acts of the defendant proscribed by the antitrust laws. Since the extraction plant was simply a proposal and not a tangible reality, the court below must have felt that it did not

constitute "business or property." We think this was error. The rule of this circuit has been well stated by Judge Bell in *Martin* v. *Phillips Petroleum Co.*, 5 Cir. 1966, 365 F.2d 629, 633, *cert. denied,* 1967, 385 U.S. 991:

> "There are numerous decisions stating that one need not have an actual going business to obtain standing, but an attempt to enter a business is sufficient. Triangle conduit & Cable Co., Inc. v. National Electric Products Corporation, 3 Cir., 1945, 152 F.2d 398; American Banana Co. v. United Fruit Co., 2 Cir. 1908, 166 F.261; Waldron v. British Petroleum Co., Ltd., S.D.N.Y., 1964, 231 F.Supp. 72; Delaware Valley Marine Supply Company v. American Tobacco Company, E.D.Penn., 1960, 184 F.Supp. 440. However, these decisions lay down two significant requirements. First, there must be the intention to enter the busness; and second, there must be a showing of preparedness to enter the business. This is the rule in this circuit. See North Texas Producers Association v. Young, 5 Cir., 1962, 308 F.2d 235, cert. den., 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed 2d 733, where the court stated the rule, and that the plaintiff there met the business requirement."

See also *Denver Petroleum Corp* v. *Shell Oil Co., supra,* 306 F.Supp. at 307-08. We think that the evidence here could support a finding that plaintiff Southeastern had both the intention and the preparedness to construct an extraction plant and that, if the jury so finds, Southeastern would be entitled to damages. Therefore, upon remand, plaintiffs should be afforded an opportunity to prove such damages before a jury.

F. Reconciliation of the Verdict

Defendants finally contend that even if the judgment n.o.v. was improper, we may not simply reinstate the jury verdict that defendants monopolized, attempted to mono-

polize, or conspired to monopolize in violation of section 2. Rather, defendants argue, the answers to the special interrogatories are so hopelessly in conflict that we must at least reverse and remand for a new trial on liability. Defendants basically content that the answer of the jury to question number 1, that Alcoa and Crown had not combined or conspired in restraint of trade, cannot be reconciled with the affirmative answer to special interrogatory number 2, that Alcoa and Crown had monopolized, attempted to monopolize, or combined and conspired to monopolize in conjunction with one or more of several named persons. We find this argument without merit. Section 1 requires a combination or conspiracy. We think that the jury's negative answer to question number 1 was simply a recognition that the interrogatory was incomplete. That is, the jury found that Alcoa and Crown in combination only with themselves had not restrained trade. The evidence would support the conclusion that only with the aid of Appling and others were Alcoa and Crown enabled to restain trade through such conduct as refusing to deal with plaintiffs. This conclusion is wholly consistent with an affirmative answer to question 2, wherein the jury found that Alcoa and Crown monopolized, attempted to monopolize, or conspired to monopolize with Appling or others. Since the findings are reconcilable, we must assume that the jury intended this consistency. See generally *United States* v. *National City Lines*, 7 Cir., 186 F.2d 562, cert denied, 1951, 341 U.S. 916.

For the foregoing reasons, we reverse the judgment n.o.v. and order the district court to reinstate the jury verdict which found that defendants monopolized, attempted to monopolize, or conspired to monopolize with the result that plaintiff Woods Exploration was damaged to the extent of $500 and that plaintiff Southeastern was damaged to the

extent of $142,759. We further order the district court to hold a trial for the purpose of determining if plaintiffs' allegations with respect to the proposed extraction plant are true, and, if so, the extent of the damages flowing therefrom.

III.

We at last turn to the propriety of the injunction issued against plaintiffs by the court below which restrained plaintiffs from prosecuting their state court suit. That suit, filed just prior to the instant federal action, sought damages for (1) violations of the antitrust laws of the State of Texas; (2) willful misrepresentation to the Texas Railroad Commission; (3) tortious interference with contracts or advantageous business relationship and prevention of business expansion; and (4) violation of the Texas Common Purchaser's Statute. In addition, the plaintiffs sought exemplary damages. The district court, after rendering summary judgment and judgment n.o.v. in favor of defendants in the instant suit, enjoined plaintiffs from further prosecuting this state court suit.

The starting point for determining the legality of this action by the trial court is the federal anti-injunction statute, 28 U.S.C.A. § 2283, which reads:

> "A court of the United States may not grant an injunction to stay proceedings in a state court except as authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

While earlier cases under the predecessor of this statute were to the contrary, *e.g.*, *Toucey* v. *New York Life Ins. Co.* 1941, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100, recent cases have held that the present anti-injunction statute permits a federal court "to enjoin the relitigation of cases and con-

troversies which have been fully adjudicated" in such court in order "to protect or effectuate its judgment." *Jackson* v. *Carter Oil Co.*, 10th Cir. 1950, 179 F.2d 524, 526-27, *cert. denied*, 1951, 340 U.S. 812; accord, *Jacksonville Blow Pipe Co.* v. *RFC*, 5th Cir. 1957, 244 F.2d 394; 1A J. Moore, *Federal Practice* ¶ 0.208 [3.—3], at 2319, Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726 (1961).

Plaintiffs, however, contend that the decisions in *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Engineers*, 1970, ... U.S. ....., 90 S.Ct. ....., 26 L.Ed.2d 234, and *Donovan* v. *City of Dallas*, 1964, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409, have eroded the "relitigation" exception. We disagree. Both cases caution against the dangers of federal-state friction which might be aroused by injunctive interference, but neither decision purports to undermine the exceptions of § 2283. In *Donovan* the Supreme Court held that a state court cannot validly enjoin a person from prosecuting an *in personam* action in a federal court which has jurisdiction of the parties and of the subject matter. The decision was grounded upon the fact that federal-court remedies are rights "granted by Congress and cannot be taken away by the State." The converse proposition, however, does not hold true, for Congress can authorize federal interference with state court remedies in order to protect federal jurisdiction. The Court in Donovan said as much when it noted:

> "While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances [citing § 2283], it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here." 377 U.S. at 412-13.

In Atlantic Coast Line R.R. the Court simply decided that federal courts do not have inherent power to enjoin state proceedings but must abide by the express exceptions to § 2283. The Court reasoned:

> "On its face the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondent here has intimated that the Act only establishes a "principle of comity," not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1954 when this Court interpreted this statute, it stated: "This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." Amalgamated Clothing Workers v. Richman Brothers, 348 US 511, 515-516, 00 L.Ed 600, 607-608, 75 S Ct 452 (1955). Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."
>
> ..... U.S. at .....

The "relitigation" principle, therefore, retains its vitality and means simply that a federal court may enjoin a state

proceeding which is precluded under the doctrine of *res judicata*. As one commentator has noted, "this is a sensible solution to the problem of relitigation of federal decisions. It prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review." Note, *Federal Power to Enjoin State Court Proceedings, supra,* at 734. See also *Developments in the Law — Injunctions,* 78 Harv. L. Rev. 993, 1052 (1965). We think that in the instant case the district court decision was *res judicata* of the state proceeding and thus justified the issuance of an injunction.

The principle of *res judicata* "makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding." 1B J. Moore, *Federal Practice* ¶ 0.405 [1], at 624. Plaintiffs argue that this doctrine is inapplicable with respect to concurrent federal and state antitrust suits. They contend that "a person who has suffered damages in his business or property by reason of violations of the antitrust laws of the United States and those of the State of Texas may pursue his remedy in both federal and state courts and recover damages in each action." In essence, plaintiffs would have us hold that their state and federal court suits do not constitute alternative avenues to remedy the same wrong.

It is true that numerous cases have held that the federal antitrust laws are not preemptive of state antitrust regulation. E.g., *Standard Oil Co.* v. *Tennessee,* 1910, 217 U.S. 413, 30 S.Ct. 413, 54 L.Ed. 817. Texas courts, recognizing the complementary features of this federal-state regulation, have further held that the pendency of a federal antitrust

action involving the same parties and the same operative facts does not preclude the prosecution of a state action. E.g., *Sessions Co.* v. *W. A. Sheaffer Pen Co.*, Tex. Civ. App. 1961, 344 S.W.2d 180; *Bergholm* v. *Peoria Life Ins. Co.*, Tex. Civ. App. 1933, 63 S.W.2d 1064. This does not mean, however, that the federal and state suits constitute separate causes of action. Rather, those cases simply hold that prior to a final judgment the federal antitrust laws do not have a preemptive effect. Cf. *Areeda, supra,* at 56-59. We therefore reject plaintiffs' contention that the decision of *Woods Exploration & Producing Co.* v. *Aluminum Company of America,* Tex. 1964, 382 S.W.2d 343, which held that plaintiffs had alleged a cause of action under state law, is now the law of the case and precludes the injunction issued by the court below. That case arose prior to any final decision in the instant case and has no bearing on any preclusive effect that might be accorded the federal decision once rendered.

Nor are we persuaded that the state and federal suits constituted separate causes of action because they alleged the violation of primary duties imposed by separate sovereignties — the state and federal governments. Cases have held that both the state and federal governments may enforce concurrently their antitrust laws, see *United Shoe Mach. Co.* v. *United States,* 1922, 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708; *State* v. *Southeast Texas Chapter of Nat. Elec. Contr. Ass'n,* Tex.Civ.App. 1962, 358 S.W.2d 711, but the court in *F. L. Mendez & Co.* v. *General Motors Corp.*, 7 Cir. 161 F.2d 695, cert. denied, 1947, 332 U.S. 810, pointed out the inapplicability of such analogies to private antitrust suits:

> "The essential teaching [referring to *United Shoe* where Court permitted separate government suits under Sherman and Clayton Acts] is that the Govern-

ment had a right to complain of violations of each of two different statutes. Here we are deciding the question of whether a plaintiff who avers that his contract right to sell defendant's automobiles has been invaded through the wrongful action of defendant may maintain a second action therefor after once having lost. We hold that such a plaintiff can not split that cause of action; that he must assert in his suit all wrongful acts on the part of defendant upon which he relies to show invasion of his asserted right and that, if he fails, he may not, later, recover in another suit for invasion of the same right by wrongful acts on defendant's part which he failed to assert in his original suit. It is clear that plaintiff suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or another of wrongful actions by defendant or to a combination of some or all of them. There is, under either view, but a single wrongful invasion of a single primary right, whether the acts constituting such invasion are one or many, simple or complex. Baltimore S. S. Co. v. Phillips, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069."

We think the proper test was stated in *Englehardt* v. *Bell & Howell Co.*, 8 Cir. 1964, 327 F.2d 30, 31, where the court rejected plaintiff's allegation that the "district court erred in granting appellee's motion for summary judgment because a cause of action based upon violation of the federal antitrust acts (Title 15, U.S.C.) is distinct from a cause of action based upon state antitrust law, and not barred under the doctrine of *res judicata* by the prior adjudication of cases based upon such state claims." The court held that "the primary test for comparing causes of action has long been whether or not the primary right and duty, and the delict or wrong combined are the same in each action." *Id.* at 32. See also *Seaboard Coast Line R.R.* v. *Gulf Oil Corp.*, 5 Cir. 1969, 409 F.2d 879. Applying this

test to the instant case, we hold that plaintiffs' state action consists simply of alternative grounds of recovery for violations of the same primary rights alleged in the present federal action. The state action was characterized by the Texas Supreme Court as follows:

> "Appellants, Woods Exploration & Producing Company, Inc., and Southeastern Pipe Line Company, sued appellees, Aluminum Company of America, Crown Central Petroleum Corporation, Carl E. Siegesmund, Lavaca Pipe Line Company, Lumar Gas Corporation F. E. Appling and Fred Wolcott, for damages allegedly due to violations of the Texas Antitrust Statutes involving a conspiracy and combination by appellees to eliminate appellants and small tract owners from competing in the production of gas from the Appling field located in Calhoun and Jackson counties, Texas, and to restrict production from appellants' wells. The conspiracy was allegedly carried out by various means, one of which was the filing of false and fictitious nominations or Producers Forecasts with the Railroad Commission of Texas." 382 S.W.2d at 344-45.

In this light, our decision in *Norman Tobacco & Candy Co.* v. *Gillette Safety Co.*, 5 Cir. 1961, 295 F.2d 362, is directly in point. Plaintiff there had brought simultaneous but separate suits in the district court, alleging in one that the defendant breached its contract to sell shaving products to plaintiff and alleging in the other that defendant's refusal to deal was a violation of the federal antitrust laws. The contract action went to trial first and Gillette won. Thereafter, the trial court entered summary judgment on behalf of Gillette in the antitrust case, and this court affirmed on the basis inter alia that the contract action was *re judicata* of the antitrust action:

> "It is settled, contrary to appellant's contention, that a litigant may not split his claim and have two trials

on the same alleged breach of duty. Basically, Norman claimed the same "right" in both suits — the right to purchase Gillette products direct from Gillette. The only wrong charged against Gillette was its refusal to continue to deal with Norman. We held in the contract case that Norman had not shown that Gillette wrongfully refused to deal with it. There, appellant relied upon the breach of Gillette's supposed contractual relationship as the basis of its claim. Here, appellant relies upon the breach of the anti-trust laws as the basis for the alleged breach. But there was one breach and one only and appellant has had its day in court and has lost. It cannot litigate this same breach again. Ballard v. First National Bank of Birmingham, 5 Cir., 1958, 259 F.2d 681; Mendez & Company v. General Motors Corporation, 7 Cir., 1947, 161 F.2d 695, and Williamson v. Columbia Gas & Electric Company, 3 Cir., 1950, 186 F.2d 464, certiorari denied 1951, 341 U.S. 921, 71 S.Ct. 743, 95 L.Ed. 1355. The mere fact that Gillette's refusal to sell alleged to have been wrongful for one reason and, in the present case for another reason, does not alter the fact that the cause of action was for the same injury. Appellant cannot get away from the fact that there has been a violation of one right by a single legal wrong. Restatement, Judgments, Sec. 63".
295 F.2d at 363-64.

Similarly, in the instant case plaintiffs claimed violations of the same primary rights arising out of the same facts asserted in the state court suit. The state and federal antitrust claims here are, therefore, simply alternative grounds of recovery for the same causes of action. The principle of *res judicata,* enforceable by injunction, would thus preclude relitigation in the state following this federal judgment if the state and federal counts involve substantially the same wrongs measured by similar standards of liability so that recovery in the federal suit will have compensated

plaintiffs for the total harm suffered. See Note, *Parallel State and Federal Remedies,* 71 Har. L. Rev. 513, 523-24 (1957). Alternatively, even if different standards of recovery existed in the state and federal actions, *res judicata* would be applicable if plaintiffs were afforded an opportunity to allege the state grounds which constituted the same cause of action in the federal proceedings. See Restatement. Judgments § 62. Focusing on the latter test, we think that the doctrine of pendent jurisdiction, see *Hurn* v. *Oursler,* 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148, afforded plaintiffs opportunity for joinder.[11]

In *United Mine Workers of America* v. *Gibbs,* 1966, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218, the Supreme Court established a liberal rule for judging the availability of pendent jurisdiction:

> "This limited approach is unnecessarily grudging. Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .,' US Const, Art III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 US 103, 77 L ed 1062, 53 S Ct 549. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then,

[11] Plaintiffs allege that they did in fact join their state claims in the federal action, but had them dismissed by the court. We find this contention unfounded. An examination of the pleadings reveals no reference to any state claims.

> assuming substantiality of the federal issues there is *power* in federal courts to hear the whole." Id. at 725 (footnote omitted).

See also *Whirl* v. *Kern*, 5 Cir., 1969, 407 F.2d 781, *cert. denied*, 1970, 396 U.S. 901; Note, *UMW* v. *Gibbs and Pendent Jurisdiction*, 81 Harv. L. Rev. 657 (1968). Numerous decisions have applied this principle to permit the joinder of federal antitrust claims and related state claims. E.g., *Kurth* v. *Erie-Crawford Dairy Coop. Ass'n*, 3 Cir. 1968, 395 F.2d 420; *Otto Milk Co.* v. *United Dairy Farmers Coop. Ass'n, supra*, 388 F.2d at 798; *Peerless Dental Supply Co.* v. *Weber Dental Mfg. Co.*, E.D. Pa. 1969, 299 F.Supp. 331. Since the district court had power to adjudicate both federal and state claims, plaintiffs are consequently barred from prosecuting the state court because the federal court suit was *res judicata* of all issues alleged in the state court. See *McCann* v. *Whitney*, Sup. Ct. 1941, 25 N.Y.S. 2d 354; Note, *Parrallel State and Federal Remedies, supra*, at 523-25.

Clearly, therefore, at the time the trial court entered the injunction it was empowered to do so because there was at that time a final judgment on the same causes of action asserted in the state suit, which judgment it could protect by injunction.

The question arises, however, as to whether or not the injunction may be continued in light of our actions on appeal. We hold that the injunction may not be continued. It is clear that the power to issue an injunction restraining further proceedings in a state court rests on the existence of a final judgment which has a *res judicata* effect on the particular causes of action which are asserted in the state Suit. It is also obvious that a judgment later reversed on appeal has no *res judicata* effect after the reversal. 1B J. Moore, Federal Practice ¶ 0.416 [2].

In the instant case we have reversed and remanded certain issues for trial. As to these issues there is now no final judgment and hence no basis for an injunction against further state court action. On another issue we have reversed the trial court and ordered the jury's verdict reinstated. As to this matter the trial court may, if it wishes, render a partial final judgment under Fed. R. Civ. P. 54. If the trial court does order such a partial final judgment, then it may enjoin further proceedings in the state suit on claims covered under the doctrine of *res judicata* by that judgment. In addition, when a judgment or judgments are rendered as to the other claims raised in this suit, then the trial court may in its discretion issue another injunction to protect the final judgment or judgments.

IV.

We have at least reached the end of our long and protracted journey through the Appling Field and points beyond. We find it unnecessary to prolong that journey by a discussion of certain additional points of error raised by the parties, since we find them without merit. In view of the length of this opinion, we now summarize our conclusions.

First, we reverse the summary judgment for defendants with regard to the filing of false nominations and remand the issue for trial.

Second, we reverse the judgment n.o.v. with regard to monopolization and order the district court to reinstate the jury verdict which found both liability and damages. We further remand for trial the issue of damages flowing from defendants' alleged conduct with regard to the proposed extraction plant.

Third, we vacate the injunction restraining plaintiffs from prosecuting their state court suit, but we authorize the

district court in its sound discretion to enjoin the future pursuit of some or all of the state claims if and when a complete or partial final judgment is entered in the instant case.

REVERSED and REMANDED IN PART.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 28763 and 29487

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,

Plaintiffs-Appellants,

v.

ALUMINUM COMPANY OF AMERICA, ET AL,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan 5, 1971, 5 Cir., 1971, 438 F.2d 1286).

(March 17, 1971)

Before BROWN, Chief Judge, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Appellees' argument to the contrary notwithstanding, we think our opinion clearly states that the trial on remand with regard to the alleged filing of false nomination forecasts shall encompass all those issues which are associated with antitrust actions.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION No. 14,669

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL

v.

ALUMINUM COMPANY OF AMERICA, ET AL

MEMORANDUM OPINION

February 6, 1973

This is a Sherman Act case in which the defendants have filed a motion for judgment n. o. v. and, in the alternative, for a new trial following a judgment entered by the Court on a jury verdict returned on the second trial of the case. The factual and procedural background of the litigation is detailed fully in *Woods Exploration and Production Co.* v. *Aluminum Company of America,* 438 F. 2d 1286 (1971), which reversed and remanded the case for further proceedings.

The motion for judgment notwithstanding the verdict raises no points not already foreclosed by the opinion of the Court of Appeals, *supra.* For example, the issue of injury to "business or property," required by Section 4 of the Clayton Act is dealt with at p. 1310-1311; the statute of limitations issue is settled at pages 1299-1300. The claim that Southeastern's proof of damage was too speculative also fails. It was based on management studies of net fu-

ture profits presented by the testimony of experts in the field. This proof indicated that the operation of an extraction plant did not require a large staff or experienced management. Indeed, during night hours such a plant is operated without attendance, and in daylight hours, it was largely a one-employee operation. The defense introduced testimony not only as to the types of plants and probable profits but the method of operation. The jury chose the plaintiffs' proof.

The motion for new trial claims that the court erred (1) in informing the jury of the prior jury verdict; (2) in excluding expert testimony as to the genuineness of Fred Wolcott's signature on plaintiffs' Exhibit 7-A which the former jury had found not genuine and which was admitted not to be by the plaintiffs; (3) in giving Instruction No. 32, in which the court advised the jury that individual action taken by the defendants in the courts or before the Railroad Commission of Texas was entirely privileged under the Constitution; however, when persons combined to harass and deter competitors in furtherance of a monopoly, that such action in court or before the Commission then became a constituent element of the unlawful scheme; and (4) in admitting testimony "so replete" with hearsay that it could not be detailed within defendants' brief. The court has given careful consideration to each claim and finds none of them meritorious.

1. Background of the Case:

The litigation is now in its eleventh year and has entailed numerous hearings on which at least three District Court opinions have been written; it has been in the Court of Appeals twice and that court has written one twenty-seven page opinion dealing with the original trial; upon reversal by the Court of Appeals the case went to the Supreme Court

on petition for certiorari, which was denied; it has been tried before two juries in the District Court, this being the second.

As the Court of Appeals stated in its reversal, the plaintiffs alleged in their complaint that the defendants Alcoa and Crown had monopolized, conspired to or attempted to monopolize an appreciable part of the trade and commerce of drilling for, producing and transporting gas from the Appling Field; the alleged means by which the monopolization was effectuated included the filing by the defendants of false nominations for production of gas from Appling Field; the interference by the defendants with the building of a pipeline by the plaintiff Southeastern to transport its gas to market; and the elimination of plaintiffs from the building of an extraction plant to separate the liquids from such gas as it was transported to market. Before the first trial the defendants' motion to dismiss was sustained by the trial court as to the false nomination issue and during the first trial the extraction plant phase of the case was dismissed because no injury to "business or property," as required by Section 4 of the Clayton Act, was shown. The phase of the case involving the defendants' alleged interference with the building of the pipeline by the plaintiffs was decided by the jury in favor of the plaintiffs, and $142,759.00 in damages was awarded Southeastern. However, the trial court sustained a motion for judgment notwithstanding the verdict, the verdict was set aside, and the complaint was dismissed.

On appeal all of these orders of the trial judge were reversed, 438 F. 2d 1286, and the District Court was directed to try the false nominations phase of the case on both liability and damage. The extraction plant phase of the case, however, was remanded for trial only "on the issue of dam-

ages." The Court held that the proof was sufficient to show injury to "business or property." The court held:

> "We think that the evidence here could support a finding that plaintiff Southeastern had both the intention and preparedness to construct an extraction plant and that, if the jury so finds, Southeastern would be entitled to damages. Therefore, upon remand, plaintiffs should be afforded an opportunity to prove such damage before a jury." At 1310.

On the claim of interference with the building of the pipeline the Court of Appeals ordered the District Court "to re-instate the jury verdict which found both liability and damages" and to enter a partial final judgment thereon if the trial judge concluded it appropriate. At 1316. Upon remand the writer was designated to sit as a trial judge in the disposition of the case under the mandate of the Court of Appeals.

2. Action Taken on Remand:

The Court of Appeals in its opinion laid down the law of the case in no uncertain terms, and this court has undertaken to implement its directives in a meticulous and fair manner. First, the jury verdict at the first trial on the pipeline issue — which covered "both liability and damage" — was reinstated as the Court of Appeals directed. After careful consideration, including the hearing of argument, the Court decided to enter a partial final judgment on the verdict rather than the setting it aside and having a new trial. This was consistent with the language of the Court of Appeals opinion and clearly within its intent. The Court found that the entry of the judgment would be fair to the parties and not prejudice the disposition of the other phases of the case. Second, the alleged false nominations phase of the case was dismissed by the plaintiffs with prejudice. Third,

the remaining extraction plant claim was, pursuant to the terms of the remand, tried only "on the issue of damages." The Court limited the proof to the evidence as to the intent and preparedness of Southeastern to enter successfully into this joint venture, plus testimony linking Southeastern's damage with the overall monopolization finding of the jury in the first case, and, finally, evidence of the actual damage Southeastern thereby suffered.

In order to succeed on their extraction plant claim, plaintiffs were not required to prove up the overall monopoly again because the jury's answer in the first trial to Question No. 2 of its verdict, which the Court of Appeals ordered reinstated, was — under the law of the case as well as the principles of estoppel — a finding of the existence of the monopoly, conspiracy to or attempt to monopolize the trade or commerce of drilling for, producing and transporting gas from the Appling Field.

It is enough that plaintiffs convince a jury, as they have, that defendants interfered with the extraction plant pursuant to their monopolization established by the jury's answer to Question No. 2 at the previous trial. The extraction of liquids from the gas affects the economics of its transportation, just as transportation and drilling activities affect the production of gas. "In essence, plaintiffs paint a picture of concerted action by defendants to restrain, hinder or eliminate plaintiffs' extraction of gas from the common gas reservoir shared with defendants." 438 F. 2d at 1308. Likewise, interference with arrangements for the transportation of gas may disrupt subsidiary arrangements for the extraction of its liquids. The proposed written contract between Lumar and Southeastern calling for the transportation of the latter's gas through Lumar pipelines included a provision reserving to Lumar the right to build an extraction

plant on its line but giving Southeastern the right to participate in the investment and profits of such a plant. The proof was that Lumar built an extraction plant on its own pipeline after its agreements and dealings with Southeastern had been terminated. It seems plain that the contemplated joint extraction plant venture hinged on the arrangement permitting Southeastern to transport its gas through Lumar's pipeline. In the previous trial the jury imposed antitrust liability on defendants for preventing the consummation of the pipeline agreement between Lumar and Southeastern. In this factual context the argument that the monopolization found to exist by the first jury is so unrelated to the extraction plant claim as not to provide any basis for such claim must be rejected. Plaintiff Southeastern has won its case by convincing the jury that defendants interfered with an extraction plant agreement, that this injury was to Southeastern's business and property, and that the injury was proximately caused by the defendants' monopolization of the trade or commerce of transporting, drilling for and producing gas as established by the prior jury verdict.

Moreover, it is this court's judgment, independent of the law of the case as established by the Court of Appeals, that defendants have not been denied a fair trial. The standard for granting a partial new trial is whether the issue remaining to be tried are so distinct and independent from the rest of the case that they may be separately tried without injustice. Here the issues pertaining to the relevant market, monopoly power and intent to monopolize were all concluded in the first trial as were the damages on the frustration of the pipeline. The second trial involved issues as to whether Southeastern had the preparedness and intention to participate in an extraction plant with Lumar, whether

there was an agreement to this effect, whether such arrangement was frustrated and what were the resulting damages. It is submitted that the issues in the two trials were sufficiently distinct and independent to permit a partial new trial. The only issue in the second trial that related to the jury verdict at the first trial was whether plaintiffs' injury resulting from defendants' interference with the extraction plant was proximately caused by defendants' monopolization established by the verdict at the first trial. There was some overlapping on this issue, but defendants were not in any way prejudiced by having the jury determine the proximate cause issue without reopening the question of monopolization. The defendants were given wide latitude to introduce all evidence bearing on proximate cause and no prejudice resulted.

On remand at the time of the selection of the jury, the court read to the panel the verdict of the jury at the first trial and advised them of the nature of the case, the respective claims of the parties and their duties as jurors to take the law of the case from the Court and that full and detailed instructions would be given them before they received the case. The Court then required the plaintiffs to offer proof that Southeastern had both the intention and the preparedness to construct an extraction plant pursuant to an agreement that it had with Lumar; that the plant was not only feasible but would have been profitable; and that defendants' monopolization thwarted this agreement with Lumar as well as others with Graver Oil and Gas Equipment Company and Marler Construction Company. The defendants offered their proof in rebuttal and at the close of the evidence, the Court prepared the charge to the jury. It followed generally the submissions of the defendants with the exception of their initial question and its affiliates.

The Court in first draft of the charge summarized the jury finding at the first trial concerning defendants' monopolization of the extraction of gas from Appling Field. When the defendants objected that the characterization was not full and complete, the Court then incorporated the whole verdict in the charge. The defendants then objected to whole charge being read. The case was submitted on the theory that the monopolization charge had been established at the prior trial. The special issues submitted covered the other phases of the case which the Court of Appeals indicated were necessary to a recovery. See 438 F. 2d at 1299-1300.

3. The Defendants' Objections:

(a) The defendants' motion for judgment notwithstanding the verdict is based on points already decided against them by the Court of Appeals. Defendants argue that the proof of damage was mere conjecture, speculation and guesswork. On the contrary, plaintiffs had an expert prepare a study of the potential of the proposed extraction plant. In the writer's opinion, the study was quite well prepared. Indeed, the defendants must have found it had substance since they saw fit to offer a counter study. The jury chose that of the plaintiffs. There is no merit to defendants' contentions.

(b) On the alternative motion for a new trial the defendants' points are likewise without merit. The claim of insufficient evidence has no substance. The evidence was strong—though conflicting—that the plaintiffs were ready, willing and able to participate in the extraction plant project. The Court gave the defendants wide latitude in trying to convince the jury that the allowables were not sufficient to run an extraction plant profitably; that plaintiffs could

not secure the money necessary to go through with the project because of lawsuits attacking the ⅓-⅔ rule as well as their financial status; and that plaintiffs' testimony, especially Woods', was not credible on the second trial because their testimony at the first trial that Fred Wolcott's signature on the proposed pipeline contract was genuine was impeached by the first jury's verdict. Still the jury decided against the defendants on all of these issues.

(d) The evidence that defendants offered on the drainage issue was properly excluded as immaterial. There was no dispute over the fact that all of the gas produced by plaintiffs was legally produced under valid orders of the Railroad Commission of Texas. Defendants offered testimony of a handwriting expert that the signature of Fred Wolcott to Plaintiffs' Exhibit 7a was not genuine. But the jury in the first trial had so held and plaintiffs were not now contending to the contrary. The effort was purely to introduce unnecessary cumulative evidence to prejudice the plaintiffs unfairly in the eyes of the jury.

(e) Defendants' objection as to Instruction 32 is not persuasive. There was testimony that Alcoa caused a shutdown of Woods' wells on a spurious complaint; and that each time the plaintiffs received a favorable ruling from the Commission or the granting of a permit, defendants filed a law suit to delay and prevent its implementation. Indeed there was testimony indicating that defendants gave standing instructions to file suits as soon as plaintiffs received favorable orders. The Instruction merely said that if these actions were part of defendants' monopolization activities, then they were illegal. That is the law.

(f) The defendants also complain of the admission of hearsay evidence as to the agreement to erect and operate the extraction plant. The testimony was that of the agents

of the parties involved and was not hearsay. It was not necessary that they be co-conspirators since the testimony had to do with contracts to which the defendants were not parties. Some testimony was conflicting as to the authority of the parties to act. This question was resolved by the jury. Moreover, it was determined by the jury in the first trial that the defendants and Appling prevented Wolcott from signing Exhibit 85A but that an agreement was actually consummated. Mr. Appling and Mr. Wolcott were both deceased at the time of the second trial but their testimony was read to the jury. Both were outspoken, readily admitted being involved in the controversy and the jury simply did not accept their testimony.

(g) The remaining objections are not worthy of notice, particularly the charge that the totality of the court's rulings and conduct indicate clearly to the jury that their verdict should be adverse to defendants. They are wholly without merit.

Dated February 6, 1973.

/s/ Tom C. Clark
Tom C. Clark
Associate Justice, Supreme
Court of the United States (Ret.)
sitting by designation

WOODS EXPLORATION & PRODUCING COMPANY, INC., et al., Plaintiffs-Appellees,

v.

ALUMINUM COMPANY OF AMERICA et al., Defendants-Appellants.

WOODS EXPLORATION & PRODUCING COMPANY, INC., et al., Plaintiffs,

Southeastern Pipeline Company, Plaintiff-Appellee-Cross Appellant,

v.

ALUMINUM COMPANY OF AMERICA et al., Defendants-Appellants-Cross Appellees.

Nos. 72-2792, 73-1633.

United States Court of Appeals, Fifth Circuit.

March 13, 1975.

An antitrust action was brought by owners of wells in a Texas gas field against other producers. On remand from a prior appeal, the United States District Court for the Southern District of Texas, at Houston, Tom C. Clark, Associate Justice of the Supreme Court Retired, sitting by designation, reinstated a jury verdict for plaintiff on the issue of monopolization of transportation of petroleum from the field and, on retrial of an issue involving the building of a liquid extraction plant by plaintiff, entered final judgment on the jury's verdict in plaintiff's favor, and both plaintiff and defendants appealed. The Court of Appeals, Simpson, Circuit Judge, held, inter alia, that the

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trial court discharged its duty to weigh the evidence independently in ruling of a motion for new trial; that it acted properly in not requiring that the monopolization issue be retried on remand; and that the evidence was sufficient to support the jury's finding on the extraction issue.

Affirmed.

1. Courts — 406.1(6)

Where separate appeals from judgment by trial court on two issues raised in antitrust action were consolidated by Court of Appeals for purposes of oral argument and decision by that court, and consolidation served underlying purpose of rule concerning entry of partial final judgments, Court of Appeals was not required to consider whether its earlier authorization of entry of partial final judgment on one issue was law of case, nor was it necessary to decide strict technical question whether entry of such judgment was proper under such rule. Fed.Rules Civ. Proc. rule 54(b), 28 U.S.C.A.

2. Courts — 406.8

Issues which Court of Appeals had ruled upon in prior appeal of antitrust action were no longer open for consideration on subsequent appeal. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

3. Federal Civil Procedure — 2372

Trial court properly discharged its duty to weigh evidence independently in ruling on new trial motion filed in antitrust action. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2; Fed.Rules Civ.Proc. rule 50(c)(1), 28 U.S.C.A.

4. Interest — 39(3)

Interest is to be computed from date judgment should properly have been entered for plaintiff.

5. Interest — 39(3)

Where, after trial court entered judgment n. o. v. in defendants' favor in antitrust action, partial summary judgment in plaintiff's favor was entered on remand of action by Court of Appeals, interest on judgment was properly computed from date of entry of judgment n. o. v.

6. Courts — 406.9(21)

Where, on appeal of antitrust action, Court of Appeals reinstated jury verdict on issue whether defendants had conspired to monopolize transportation of petroleum from oil field and remanded action for new trial of second issue whether plaintiff was entitled to damages for alleged frustration of its plans to build extraction plant, extraction plant issue and monopolization issue were not so wholly separate as to require resubmission of antitrust liability question to jury on remand and issue on remand was properly limited to that of damages flowing from defendants' alleged interference with construction of extraction plant through their concerted activities. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

7. Courts — 406.9(21)

Where, on appeal of antitrust action involving alleged monopolization of transportation of petroleum from oil field, Court of Appeals reinstated jury's verdict for plaintiff on monopolization issue but remanded for retrial only on issue of damages flowing from defendants' alleged interference with building by plaintiff of proposed liquid extraction plant, trial court was correct in instructing jury on retrial as to result reached by first jury in original trial on monopolization issue. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

8. Courts — 406.9(21)

Trial court did not err in excluding testimony during retrial of antitrust action concerning alleged forgery of

signature on contracts between parties in view of fact that jury was adequately apprised of forgery by virtue of court's instructions concerning verdict of jury in original trial. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

9. Monopolies — 28(8)

Where, in antitrust action in which plaintiff claimed, inter alia, that it was prevented by defendants' monopolization of transportation of petroleum from oil field from going forward with construction of proposed liquid extraction plant, one defense theory was that extraction plant was not economically feasible at time its construction was proposed because, at that time, one defendant and others were challenging legality of one-third — two-third proration formula and Texas Railroad Commission ruling allowing multiple completions on plaintiff's small town lot wells, trial court properly instructed jury that acts which are in themselves legal lose their character when they become constituent elements of unlawful scheme. Fed.Rules Civ.Proc. rule 49, 28 U.S.C.A.; Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

10. Monopolies — 28(7.4)

In antitrust action in which defendants were alleged to have monopolized transportation of petroleum from oil fields, evidence was sufficient to support jury's findings that plaintiff had intent and purpose to go forward with building of proposed liquid extraction plant and that such plans were frustrated by defendants' monopolistic practices. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

11. Monopolies — 28(7.6)

In antitrust action in which plaintiff alleged that its building of proposed liquid extraction plant was frustrated because of defendants' acts in monopolizing transportation of petroleum from oil field, plaintiff's proof of damage in

form of lost profits from proposed plant was not too speculative because of mere fact that some questions were raised as to mathematical precision with which such future profits could be determined. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

12. Courts — 406.1(6)

Where cross appellant in antitrust action, although asserting that jury was improperly instructed to deduct from its award the amount that it would have to pay as corporate income taxes on amounts constituting lost income from proposed extraction plant whose construction was frustrated by monopolistic practices, prayed that judgment be affirmed if reformation of jury verdict in such respect would require remand for recomputation of damages by yet another jury, and Court of Appeals concluded that correction of verdict would require such resubmission. Court of Appeals would pretermit discussion of propriety of questioned instruction. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

Appeals from the United States District Court for the Southern District of Texas.

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

We review in these consolidated appeals the proceedings occurring below in this matter since its former appearance here. The facts have been amply stated in our prior opinion. Woods Exploration Co. v. Aluminum Co. of America, 5 Cir., 1971, 438 F.2d 1286, cert. denied, 1972, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 and those of the district court, W.D.Tex.1968, 284 F.Supp. 582, and W.D.Tex.1969, 304

F.Supp. 845. We will repeat only so much of the background history of the case as is necessary to dispose of the current appeals.

By our opinion at 438 F.2d 1286 we disposed of the issues before us on the prior appeal in the following manner:

> (i) We reversed the district court's entry of judgment n. o. v. in favor of the defendants, Aluminum Company of America, and others, (hereinafter usually Alcoa) as to charges by the plaintiffs-appellants there, appellees-cross-appellants here, Woods Exploration & Producing Company, Inc., and others (hereinafter usually Woods) that Alcoa conspired to monopolize, attempted to monopolize, or monopolized the mining and transportation of natural gas from the Appling Field in Jackson and Calhoun Counties, Texas, and directed that the jury verdict in favor of Woods on this issue (the monopolization issue) be reinstated;
>
> (ii) We reversed the district court's entry of partial summary judgment for Alcoa on the claim of Woods that Alcoa filed false nomination forecasts with the Texas Railroad Commission in an effort to limit Woods' production of natural gas from the Appling Field and remanded that issue (the false nominations issue) for trial;
>
> (iii) We vacated the district court's injunction prohibiting Woods from pursuing identical litigation in the state courts of Texas pending resolution of the false nominations issue on remand; and
>
> (iv) We reversed the trial court's exclusion of the issue of damages flowing from Alcoa's alleged interference with Woods' plan for construction of a liquid extraction plant in conjunction with Lumar Gas Pipe Line Company (hereinafter Lumar) and remanded for retrial only on the issue of damages flowing from the interference with the proposed extraction plant (the extraction plant issue).

On remand, Woods explicitly abandoned the false nominations claim, and the district court as to this issue entered a partial dismissal with prejudice. The district court reinstated the jury verdict for Woods on the monopolization issue and entered partial final judgment in Woods' favor thereon pursuant to Rule 54(b), F.R.Civ.P. Finally, as we had directed, the trial court held a retrial limited to the issue of damages on the extraction plant issue. The retrial resulted in a jury verdict and award of damages in Woods' favor, and the district court entered final judgment thereon.

Defendants Alcoa and others now appeal from the partial final judgment entered against them on the monopolization issue and from the final judgment against them on the extraction plant issue. For clarity, we treat the two issues separately.

I THE MONOPOLIZATION ISSUE

[1] *A. Partial Final Judgment Under Rule 54(b), F.R. Civ.P.* Appellants argue that the district court improperly entered partial final judgment on the monopolization issue under Rule 54(b), F.R.Civ.P. because the suit below involved only one claim for relief, and partial judgment is barred under Rule 54(b). Appellees answer that the district court, in entering partial final judgment, did no more than follow the law of the case which we established in our prior opinion, 438 F.2d at 1316: "As to [the monopolization issue] the trial court may, if it wishes, render a partial final judgment under Fed.R.Civ.P. 54." Appellants respond that since the Rule 54(b) issue was not before this court on the prior appeal, our authorization of the entry of partial final judgment cannot be considered the "law of the case" on this appeal.

We need not consider whether our earlier authorization of the entry of partial final judgment on the monopoliza-

tion issue is the law of the case, nor need we decide the strict technical question whether the entry of such judgment was proper under the provisions of Rule 54(b), F.R.Civ.P. By our prior direction, the separate appeals from judgment on the monopolization issue and from judgment on the extraction plant issue were consolidated for purposes of oral argument and decision by the court. This consolidation served the underlying purpose of Rule 54(b), which is to prevent prejudice to the parties and unnecessary cost to the public by piecemeal appellate consideration of issues so intimately intertwined as to constitute but one claim. Wright & Miller, Federal Practice and Procedure: Civil § 2654, p. 54 (1973). Remand on this procedural point would be no more than an empty gesture in which we decline to indulge. We affirm the district court's entry of partial final judgment on the reinstated jury verdict in favor of the plaintiff's on the monopolization issue.

[2] *B. Exclusion of Production Evidence.* Alcoa strenuously urges that exclusion from the jury of evidence from two Texas Supreme Court decisions, Railroad Comm'n v. Aluminum Company of America, Tex.1964, 380 S.W.2d 599 and Railroad Comm'n v. Woods Exploration and Producing Co., Tex.1966, 405 S.W.2d 313, cert. denied sub nom. Aluminum Co. of America v. Woods Exploration, Inc., 1966, 385 U.S. 991, 87 S.Ct. 602, 17 L.Ed.2d. 450 deprived Alcoa of the benefit of evidence from which the jury could have concluded that Alcoa and its associated appellants were incapable of monopolizing or dominating production and transmission of natural gas from the Appling Field. The evidence sought to be introduced was, in sum, that Alcoa's ownership of approximately 90% of the surface land area in the Appling Field, because of the ⅓ - ⅔ proration formula and the limited productive capacity of Alcoa's large tract wells, did not necessarily support

a conclusion that the defendants had the power to "control prices or exclude competition." United States v. E. I. DuPont de Nemours & Co., 1956, 351 U.S. 377, 391-92, 76 S.Ct. 994, 1005, 100 L.Ed. 1264, 1278-79. Alcoa argues that such power is necessary as a prerequisite to a finding of a violation of § 2 of the Sherman Act, Title 15 U.S.C. § 2.

As pointed out by Woods, we need not consider this point further. It was fully examined and was disposed of by this court on the prior appeal in our ruling on the issue of whether the judgment n. o. v. was properly granted. We then expressed the view:

> [W]e hold that the Appling Field clearly constitutes the relevant geographic market, and that the jury could find that defendants possessed sufficient power in that market to monopolize the production of natural gas. 438 F.2d at 1304.

We stated further:

> Viewing the Appling Field as the relevant market, we think the jury was warranted in finding that defendants possessed monopoly power in that Field. Defendants contend first that the evidence demonstrates that plaintiffs in fact were able eventually to produce their production quota so that defendants' lack of monopoly power is apparent. We disagree. While plaintiffs did eventually manage to produce their production quota, they incurred both increased expenditures and lost production due to defendants' conduct. *More important, we do not think that absolute success in excluding competition is an essential element to proving monopoly power under section 2.* It is enough that defendants' market position is such that they have substantial power to thwart competition. The defendants here and their alleged co-conspirators owned or leased approximately 90% of the Appling Field. *Their holdings were so situated that they could block transportation from*

> *competing wells.* We think that the jury could find on this state of the facts that defendants possessed monopoly power in the Appling Field within the meaning of the Act. (Emphasis added) 438 F.2d at 1307.

This language demonstrates that Alcoa's claim is foreclosed by our prior opinion, which is binding on this panel. Cf. Gulf Coast Building & Supply Co., Inc. v. I.B.E.W., 5 Cir. 1972, 460 F.2d 105, 107.

C. The Admission of Pipeline Construction Cost Figures. Alcoa asserts that the trial court improperly allowed the jury to consider the $99,100 cost to Woods' subsidiary, Southeastern Pipeline Co., to build a gas pipeline to transport gas out of the Appling Field. This undertaking of construction was occasioned by a refusal of Lavaca, an Alcoa subsidiary, to deal with Southeastern and by the refusal of Lumar to accept Woods' gas for transmission in its pipeline. Alcoa urges that the initial cost of $99,100 for the pipeline was more than offset by profits in excess of $235,000 which Southeastern netted for transporting Woods' gas for the years 1961-64. Alcoa concludes by asserting that damages and not costs are the essence of a section 2 violation and that Woods and Southeastern, far from being damaged by having to construct their own pipeline, actually profited from the venture.

Here again, we find our prior opinion to be dispositive. We stated there that we found the jury computation of damages flowing to Southeastern:

> clearly supported by the evidence, consisting of (1) the cost of pipe which had been purchased by Southeastern to connect Woods' wells to Lumar's line, and which could not be used since Lumar refused to deal; (2) the unnecessary expense incurred by Southeastern in building a second pipeline running alongside the

> Lumar line; and (3) the loss by Southeastern of the sale of 16,000 m. c. f. of gas per day occasioned by six weeks' loss of gas production due to Lumar's illegally-inspired refusal to deal.
>
> 438 F.2d at 1309.

This issue is no longer open upon this appeal. Gulf Coast Building & Supply Co., Inc. v. I.B.E.W., supra.

[3] *D. Sufficiency of the Evidence.* The Alcoa appellants next contend that the jury verdict finding that Alcoa prevented Wolcott (of Lumar) from signing a pipeline agreement with Woods is against the weight of the evidence and that a new trial is demanded on this crucial issue. The gist of Woods' argument on this issue at trial concerned a clause in Lumar's right-of-way agreement which required Lumar to obtain the permission of Mr. F. E. Appling[1] before transporting a specific producer's gas through the Lumar pipeline. Woods contended, and the jury found, that Alcoa and its codefendant, Crown Central Petroleum Company (Crown) caused Appling to inform Wolcott that Lumar could not transport Woods' gas through the Lumar pipeline. The appellants complain that their motion for a new trial on sufficiency grounds filed after the entry of partial final judgment on remand was erroneously denied by the trial court on grounds that this court had found the evidence sufficient to support the jury verdict. Alcoa complains that the trial court, based upon this assertedly erroneous assumption regarding our holding on the prior appeal, failed to discharge its duty to weigh the evidence independently in ruling on the new trial motion.

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[1] Appling owned certain lands in Jackson and Calhoun Counties over which Lumar had obtained easements to construct its pipeline. See the district court opinion at 304 F.Supp. 848—49.

The Woods group counters that the Alcoa appellants, by failing to file a motion for new trial either (a) in the alternative at the time they filed their motion for judgment n. o. v. or (b) as a protective measure within 10 days after the entry of judgment n. o. v. in their favor, waived the right to question the admissibility or weight of the evidence. The Woods group asserts that Alcoa's new trial motion was not filed timely under Rule 50(c)(1), F.R.Civ.P. and that hence Alcoa is precluded from raising the sufficiency issue on appeal. The appellees further urge that even assuming *arguendo* that the motion was timely filed, the record of the proceedings after remand clearly demonstrates that the trial court carefully weighed the evidence and found it supportive of the jury verdict.

We perceive the appellees' last-mentioned point to be well taken, and therefore we pretermit deciding whether Alcoa's motion for new trial was timely under Rule 50(c)(1), F.R.Civ.P. The record on appeal indicates that the trial court upon remand denied Alcoa's new trial motion only after carefully weighing the evidence. The trial judge stated in colloquy with Alcoa's counsel:

> But no one has pointed out to me the grievous error that the jury made, that there wasn't any preponderance of evidence favorable to it.
>
> • • • • • • • • • • •
>
> I have [the two volumes of testimony from the trial] in my chambers back there and have read them two or three times. I couldn't see why anything that was said in those statements, or that evidence, would require me to find that the jury — the preponderance of the evidence was the other way at all.
>
> • • • • • • • • • • •

> So if your reversal is based on propositions that I did not pass on that, you are in error because I did pass on that. And I thought, as did the Court of Appeals, that there was sufficient evidence to sustain the verdict. (App. 820-21, Appeal No. 72-2792).

We cannot say that this ruling constituted an abuse of discretion on the part of the trial judge, and we affirm the denial of the new trial motion alleging insufficiency of the evidence.[2]

[4, 5] *E. Computation of Interest.* Alcoa's last contention regarding the monopolization issue is that the trial court erroneously allowed interest on damages from October 10, 1969, the date of entry of the judgment n. o. v. in defendants' favor, urging that the proper accrual date should instead be June 25, 1972, the date that partial summary judgment was entered in favor of the plaintiffs on remand from this court. The estalished rule is that computation of interest be made from the date judgment should properly have been entered for the plaintiffs. We affirm as to this issue. Cf. Louisiana and Arkansas Ry. Co. v. Pratt, 5 Cir. 1944, 142 F.2d 847, 849.

II THE EXTRACTION PLANT ISSUE

[6] *A. Exclusion of the Monopolization Issue.* The Alcoa appellants argue that the trial court improperly excluded from the jury evidence as to the issue of antitrust liability on the trial of the extraction plant damages issue on remand. They claim that plaintiffs' lawsuit was treated

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[2] See *infra*, pages 4419, 4420 of text, subsection D. Sufficiency of the Evidence, and Note 3 thereto, (under Part II commencing page 4416, The Extraction Plant Issue) for a discussion of the Fifth Circuit "abuse of discretion" standards governing review of the denial of motions for new trial alleging insufficiency of the evidence.

as one cause of action for some purposes and as several causes of action for other purposes, and assert that a retrial on all issues is the only fair way to accomplish complete justice in this suit. Woods counters that the only issue before the trial court on remand was the damages issue, specifically whether Woods' subsidiary and co-appellee, Southeastern Pipeline Company, Inc. (Southeastern) "had the intention and the preparedness to construct an extraction plant;" and if so, the dollar amount of damages flowing from Alcoa's interference with the construction of that plant.

Support for appellees' position exists both in logic and in the law of the case as established in our prior opinion. First, we cannot agree that the extraction plant issue was so wholly separate as to require resubmission of the antitrust liability question to the jury on remand. The jury had found in the first trial that Alcoa and others had conspired "to monopolize [an] appreciable part of the trade and commerce of drilling for, producing, *and transporting* gas from the Appling Field." (Emphasis added) This issue was disposed of when partial final judgment was entered after remand from the prior appeal.

It is clear that the building of the proposed extraction plant would have been incidental to the consummation of the pipeline agreement. Hence, the only monopolization issue was related to frustration of the pipeline agreement. Remaining for consideration by the jury on remand were only the questions: (a) whether Southeastern had the intent and preparedness to build the extraction plant jointly with Lumar and (b) whether Southeastern was damaged by frustration of the plans to build the plant, the frustration flowing from Alcoa and Crown's interference with the pipeline agreement. In the first trial, these questions had been withdrawn from the jury's consideration

by the trial judge. The trial court recognized this when it stated in its unpublished memorandum opinion:

> It seems plain that the contemplated joint extraction plant venture hinged on the arrangement permitting Southeastern to transport its gas through Lumar's pipeline. In the previous trial the jury imposed anti-trust liability on defendants for preventing the consummation of the pipeline agreement between Lumar and Southeastern. In this factual context the argument that the monopolization found to exist by the first jury is so unrelated to the extraction plant claim as not to provide any basis for such claim must be rejected. Plaintiff Southeastern has won its case by convincing the jury that defendants interfered with an extraction plant agreement, that this injury was to Southeastern's business and property, and that the injury was proximately caused by the defendants' monopolization of the trade or commerce or transporting, drilling for and producing gas as established by the prior jury verdict. (App. at 123, Appeal No. 73-1633)

We agree. The issue on remand was properly limited to the issue of damages flowing from the Alcoa appellants' alleged interference with the construction of the liquids extraction plant through their concerted activity.

[7] In this connection, it was not error to instruct the jury as to the verdict reached by the first jury in the original trial of case on the monopolization issue. It was necessary for the jury in the second trial to be informed of the outcome of the prior litigation, since the resolution of the issue before it presumed the earlier findings. The claim that such instruction was error is without merit.

[8] *B. Exclusion of Expert Testimony.* Alcoa next argues that it was error to exclude testimony of its handwriting expert to the effect that Wolcott's signature on the proposed pipeline contract between Southeastern and

Lumar was not genuine. Inspection of the record discloses that the jury was adequately apprised that the signature on the pipeline agreement was not Wolcott's by the reading of the verdict of the jury in the original trial. By answer to Question Number 4 of that verdict, the prior jury found specifically that Wolcott had not signed the proposed agreement.

[9] *C. Jury Instruction 32.* Alcoa contends that the giving of Southeastern's Requested Instruction No. 32 to the jury was error under Rule 49, F.R.Civ.P. since it related to no issue submitted to the jury under the special verdict procedure invoked in this case. The instruction objected to was as follows:

> 32. You are instructed that under the antitrust laws individual action taken by defendants before the Railroad Commission of Texas and in the courts cannot be considered as evidence against them.... A person individually is privileged under the United States Constitution to take any and all such actions. You are instructed, however, that persons, including corporations, may not combine for the purpose of using governmental agencies and the courts as a means to harass and deter competitors in furtherance of their monopoly. Acts which are in themselves legal lose their character when they become constituent elements of an unlawful scheme. (App. p. 95, No. 73-1633)

Contrary to this contention, we view Requested Instruction 32 as clearly related to the question of Southeastern's preparedness to go forward with construction of the proposed extraction plant. One of Alcoa's theories at trial was that the extraction plant was not economically feasable at the time its construction was proposed, because, at that time, Alcoa and others were challenging in Texas courts the legality of the ⅓-⅔ proration formula and the Rail-

road Commission ruling allowing multiple completions on Woods' small town-lot wells. In the face of this litigation, Alcoa argued, Southeastern would have been unable to secure financing for construction of the proposed extraction plant.

Requested Instruction No. 32, therefore, informed the jury that the legal challenges to the ⅓-⅔ formula and the multiple completions allowances might be viewed as part of the overall conspiracy. If the jury took this view, then the economic impossibility of obtaining financing would be traceable to the monopolization effort, and Alcoa would still be liable for damages. In this perspective, the instruction was not improper. Appellants' other contentions regarding the giving of Requested Instruction No. 32 are without substance.

[10] *D. The Sufficiency of the Evidence.* Alcoa next contends that the jury's critical findings (i) that Southeastern had the intent and preparedness to go forward with the proposed extraction plant and (ii) that Alcoa and its co-defendants by their actions frustrated Southeastern's plans are against the great weight and preponderance of the evidence. The sufficiency of the evidence issue was squarely before the district court on Alcoa's motion for new trial. The district court, in denying that motion, stated:

> The claim of insufficienct evidence has no susbtance. The evidence was strong — though conflicting — that the plaintiffs were ready, willing and able to participate in the extraction plant project. The Court gave the defendants wide latitude in trying to convince the jury that the allowables were not sufficient to run an extraction plant profitably; that plaintiffs could not secure the money necessary to go through with the project because of lawsuits attacking the ⅓-⅔ rule

> as well as their financial status; and that plaintiffs' testimony, especially Woods', was not credible on the second trial because their testimony at the first trial that Fred Wolcott's signature on the proposed pipeline contract was genuine was impeached by the first jury's verdict. Still the jury decided against the defendants on all of these issues. App. pp. 135-36, No. 73-1633.

The established standard under our decisions for review of the denial of a new trial motion alleging insufficiency of the evidence is whether the trial court has clearly erred in denying the motion, the principle being referred to in most of our cases as "abuse of discretion". United Broadcasting Co. v. Armes, 5 Cir. 1975, 506 F.2d 766 [1975]; Faircloth v. Lamb-Grays Harbor Co., Inc., 5 Cir. 1972, 467 F.2d 685, 697; Powell v. McIntire, 5 Cir. 1969, 415 F.2d 333. Careful study of the record in this case reveals no violation of the governing standard by the trial court. We discern no error in its ruling.[3]

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[3] For a discussion of the policies underlying the scope of appellate review of orders denying or granting new trial motions and of the distinctions between the two, see, for example, Massey v. Gulf Oil Corp., 5 Cir. 1975, 508 F.2d 92 (1975); Taylor v. Washington Terminal Co., 1969, 133 U.S.App.D.C. 110, 409 F.2d 145, 147—49, cert. denied 1969, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85; Lind v. Schenley Industries, Inc., 3 Cir. 1960, 278 F.2d 79, 88—90 (en banc), cert. denied 1960, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60. As Judge Godbold pointed out in *Massey*; supra:

> [T]he operative factors underlying review of a ruling on a new trial motion are deference to the trial judge, who has had the opportunity to observe the witnesses and to consider the evidence in the context of a living trial rather than upon a cold record, deference to the jury's determination of weight of the evidence and quantum of damages, and the constitutional allocation to juries of questions of fact. We noted [in Gorsalitz v. Olin Mathieson Chemical Corp., 429 F.2d 1033, 5 Cir. 1970] that where the judge denies the motion and leaves undisturbed the jury's determination, all factors press in the direction of leaving the trial judge's ruling undisturbed. But where the judge has granted a new trial, the factors oppose

[11] *E. Damages.* Alcoa argues that Southeastern's hypothetical profits from the proposed extraction plant planned with Lumar were too speculative to form a sound basis for a jury computation of damages. Our review of the record discloses that Southeastern introduced competent evidence relating to its probable profits from the proposed extraction plant.[4] While some questions were raised as to the mathematical precision with which these future profits could be determined, this in itself will not suffice to exclude such calculations from the jury's consideration. As we stated in Lehrman v. Gulf Oil Corp., 5 Cir. 1972, 464 F.2d 26, 45, cert. denied 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665:[5]

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each other. Deference to the trial judge is subjected to opposing tensions of deference to the jury as the body to whom fact finding is constitutionally allocated and deference to the decision which the jury has reached pursuant to that authority. Furthermore, where a new trial is granted on the ground that the verdict is against the weight of the evidence, we exercise closer scrutiny than where the ground is that some undesirable or pernicious influence has intruded into the trial, because to an extent the judge has substituted his judgment of the facts and credibility of witnesses for that of the jury. Thereby we protect the litigants' right to jury trial. 508 F.2d page 94. So it is in the instant case.

[4] This evidence incuded, inter alia, (i) figures representing the amount of gas which would have flowed through the extraction plant from the time of its beginning operation in September 1961 until the time suit was filed in January 1966; (ii) the quantity of liquids which would have been present in the gas and available for extraction; (iii) the amount of liquids which would have actually been extracted by the proposed plant; (iv) the selling price of the liquids over the relevant period; less (v) the cost of transporting the liquids to market and (vi) the cost of building and operating the plant. Evidence was also introduced based upon the operation of an extraction plant which was actually built on the Lumar pipeline.

[5] Our opinion on the second appeal in *Lehrman*, from the proceedings following remand appears at 500 F.2d 659 (5 Cir. 1974). The discussion there, part IV, pages 667—670 of 500 F.2d, of damages arising from antitrust violations, is helpful and generally supportive of our holding in this case.

> [22, 23] Gulf also protests the "speculative" testimony of Ernest Brown and urges us to hold this testimony an inadequate basis for assessing Lehrman's damages. But Gulf merely protests application of the familiar rule that a wrongdoer is responsible for uncertainty in calculating the damages proximately caused by his own wrongdoing. * * Once it is apparent that damages must be assessed so as to approximate the future profits of a business, a court and jury necessarily enter into the realm of the imprecise and the uncertain. Particularly is the calculation of damages difficult when the future profits of an enterprise as young as Lehrman's must be determined, since there is no reliable track record to look back on. But uncertainty cannot end the efforts of the federal courts to redress the harm caused proprietors by violations of the freedom of the marketplace. The wrongdoer must bear the risk of the uncertainty in measuring the harm he causes. Bigelow v. RKO Radio Pictures, Inc., 1946, 327 U.S. 251, 265, 66 S.Ct. 574, 90 L.Ed. 652; Story Parchment Co. v. Paterson Parchment Paper Co., 1931, 282 U.S. 555, 566, 51 S.Ct. 248, 75 L.Ed. 544.

The basis for the damage award in the instant case was not impermissibly imprecise, under the teachings of *Lehrman* and the cases there cited. Alcoa's argument in this regard is rejected.

[12] *F. Woods' Cross Appeal as to Damages.* Woods asserts that the jury was improperly instructed[6] to deduct

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[6] By the trial court's giving of Alcoa's Requested Instruction No. 29:

> 29. If you reach and consider the issue of damages submitted to you, you are instructed in connection therewith that under the law the amount of actual damages sustained by plaintiff, if any, by reason of any violation of the antitrust laws would not be subject to federal income tax. Plaintiff Southeastern Pipeline Company bases its claim of damage on the amount of net profit before federal income taxes which it claims it would have made if it had participated with Lumar

from its award the amount that appellees would have had to pay as corporate income taxes on amounts constituting lost income from the proposed extraction plant. But Woods further urges that the judgment be affirmed if reformation of the jury verdict in this respect would require a remand for re-computation of damages by yet another jury. The separate components included by the jury in reaching its money award of $352,223.04 are not now ascertainable. We conclude that correction of the verdict would require such re-submission assuming *arguendo* its incorrectness as it now stands. See New Orleans and Northeastern R.R. Co. v. Hewett Oil Co., 5 Cir. 1965, 341 F.2d 406, 410. Accordingly, we pretermit discussion of whether the jury should or should not have been instructed to reduce its award by deduction of an estimated amount of corporate income taxes thereon, and affirm as to the cross appeal.

The judgments appealed from are in all respects

Affirmed.

Gas Corporation in the construction and operation of a gasoline extraction plant on the Lumar line. Any such net profit would have been subject to federal income taxes. Therefore, the amount of federal income taxes should be deducted from the figure of net profits before income taxes arrived at by you in determining any actual damages sustained by plaintiff Southeastern Pipeline Company.

Adm. Office, U. S. Courts — West Publishing Company, St. Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 73-1633

D. C. Docket No. CA 14,669

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Plaintiffs,

SOUTHEASTERN PIPELINE COMPANY,
Plaintiff-Appellee-Cross Appellant,

v.

ALUMINUM COMPANY OF AMERICA, ET AL,
Defendants-Appellants-Cross Appellees.

Appeals from the United States District Court for the Southern District of Texas

Before COLEMAN, AINSWORTH AND SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants-cross appellees pay to plaintiff-appellee-cross appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 13, 1975

Issued as Mandate:

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

April 24, 1975

TO ALL COUNSEL OF RECORD

No. 72-2792

WOODS EXPLORATION & PRODUCING CO., INC., ET AL.

v.

ALUMINUM CO. OF AMERICA, ET AL.

No. 73-1633

WOODS EXPLORATION & PRODUCING CO., INC., ET AL.

v.

SOUTHEASTERN PIPELINE CO.

v.

ALUMINUM CO. OF AMERICA., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH

Clerk

By BARBARA KREI

Deputy Clerk

cc: MESSRS. ROSS N. STERLING
CHARLES T. NEWTON, JR.
LEROY JEFFERS
MR. DAVID T. HEDGES, JR.
MESSRS. ARTHUR J. MANDELL
HERMAN WRIGHT
MR. LEVERT J. ABLE

RAILROAD COMMISSION OF TEXAS, ET AL.,

Appellants,

v.

WOODS EXPLORATION AND PRODUCING COMPANY, ET AL.,

Appellees.

No. A-10825.

Supreme Court of Texas.

June 22, 1966.

Rehearing Denied July 27, 1966.

WALKER, Justice.

This is another controversy between operators with wells on large tracts and those with wells on small tracts in the Appling Gas Field in Calhoun and Jackson Counties. Substantially the same parties have been before us on two previous occasions. In the first case it was held that each of the vertically separated reservoirs underlying the Field was to be considered as a separate reservoir in determining the right to a Rule 37 exception. The action of the Railroad Commission in allowing a small tract operator to make multiple completions from a single well bore in the gas sands under her property was upheld, even though production from one sand would have enabled her to recover more than the quantity of gas under her land. Benz-Stoddard v. Aluminum Company of America, Tex.Sup., 368 S.W.2d 94. In the second case it was held that the large tract operators were precluded by lapse of time from attacking the ⅓–⅔ formula established by the Commission for allocating production from the Field, even though use of the formula allowed the wells on small tracts to drain substantial quantities of gas from the larger units. Railroad Commission of Texas v. Aluminum Company of Am-

erica, Tex.Sup., 380 S.W.2d 599. The question to be decided now is whether the Commission may, for the purpose of protecting correlative rights, establish a ceiling on the monthly allowable of gas to be produced from a reservoir.

By Special Order No. 2-53,009 dated February 1, 1965, the Commission prescribed a formula to be used in determining the maximum reasonable market demand for five reservoirs in the Appling Field. This suit was instituted by Woods Exploration & Producing Co., Inc. et al. against the Commission to test the validity of the order and enjoin its enforcement. Ben Novak and others who are interested in small tract wells intervened as plaintiffs, while Aluminum Company of America and other large tract operators intervened and aligned themselves with the Commission. After the trial court rendered summary judgment in favor of the plaintiffs, declaring the order invalid and enjoining the Commission from enforcing the same, the Commission and the large tract operators prosecuted a direct appeal to this Court as authorized by Article 1738a.[1]

The question presented for decision is relatively narrow, but a rather full statement is necessary to an understanding of the contentions made by the parties. Section 12 of Article 6008 provides that the Commission shall fix the monthly allowable of gas to be produced from a reservoir "at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity." It then directs that the monthly reservoir allowable be allocated among the wells entitled to produce from the reservoir so as to give each well its fair share of the gas to be produced, with the proviso that each well shall be restricted to the amount of gas that can be produced without waste. These and

[1] All statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes.

other provisions of Article 6008 will be adverted to later in this opinion.

The usual procedure for fixing the monthly gas allowable for a reservoir is set out in Statewide Rule 31. Under its provisions market demand is ordinarily determined primarily on the basis of Producers' Forecasts filed with the Commission by operators having wells completed in the reservoir. These nominations state the volume of gas which each producer expects to be able to market from his wells the following month, and an operator may forecast any amount he desires provided it does not exceed the delivery capacity of his wells. If the Commission concludes that use of the forecasts does not result in a correct determination of reasonable market demand for the reservoir, it takes into account other pertinent facts such as average production for the previous twelve months or nominations filed by purchasers of gas. The power to do so is expressly recognized by Statewide Rule 31.

Under the provisions of Article 6008 mentioned above and where waste is not involved, market demand as determined by the Commission becomes the monthly reservoir allowable. The allocation formula applicable to the field is then used to divide the reservoir allowable among the wells entitled to produce from the reservoir. In the case of the Appling Field, this is the $\frac{1}{3}$–$\frac{2}{3}$ formula we refused to strike down in Railroad Commission of Texas v. Aluminum Company of America, supra. Subject to any inequities inherent in the allocation formula, each well thus receives its fair share of the gas produced provided all wells are capable of producing their allowables. A well incapable of producing the allowable that would normally be assigned to it is known as a limited capacity well. Under prevailing Commission procedures, limited capacity wells are assigned

the maximum allowables they can produce, and the remainder of the allowables they would otherwise be entitled to receive are allocated to other wells in the field.[2] This brings us to the problem dealt with by the Commission in its Special Order No. 2-53,009. There is no dispute as to any of the material facts. Waste is not involved in the case, and there is nothing in the record to suggest that any gas produced from the Applng Field has been devoted to unlawful uses.

As indicated above there are a number of vertically separated reservoirs in the Appling Field. Five of these reservoirs are covered by the Commission's order here in issue. One of them, the Middle Kopnicky, is the deepest and by far the largest and most productive reservoir in the Field. It originally contained more than 360 billion cubic feet of gas. Each of the other four reservoirs covered by the order overlies the Middle Kopnicky and originally contained between 3 and 4½ billion cubic feet of gas. Under Rule 37 exceptions granted by the Commission, appellees and other town lot lessees were permitted to drill numerous wells on small tracts, most of them containing approximately 1/10 of an acre, and to make multiple completions from a single well bore in each of the several reservoirs underlying their lots.

The small tract wells have delivery capacities similar to those of the wells located on large tracts. A 1961 study disclosed that drainage was taking place from the Middle Kopnicky to the smaller upper zone sands through well bore communication in the wells with multiple completions. This well bore communication distorted the producing capability

[2] Appellees say, and appellants do not deny, that this method of determining the amount each well may produce is expressly sanctioned and required by the provisions of Rule 5, which established the ⅓-⅔ allocation formula for the Appling Field.

of the upper zone well completions and thus enabled the operators to file forecasts far in excess of what the true delivery capacity of the wells would have been in the absence of such communication. It had that effect because, as pointed out above, the amounts of the forecasts are limited only by the delivery capacities of the wells.

The ⅓-⅔ allocation formula in itself gave the small tract wells a tremendous drainage advantage over the larger gas units. Prior to the adoption of the order now in question, the Commission determined that operators of many wells on small tracts were following the practice of filing forecasts at or near the full delivery capacity of their wells. These forecasts, when combined with those filed by other operators and handled in accordance with the usual Commission procedure outlined in Statewide Rule 31, resulted in the assignment of very large reservoir allowables. The reservoir allowables were so great that the large tract wells, even though they had normal or even maximum delivery capacities, were incapable of producing the allowables representing their fair share of the gas as determined by allocation formula. They were accordingly classified as limited capacity wells and assigned the maximum allowables they were capable of producing; the remainder of the allowables to which they were entitled under the allocation formula was reallocated among the town lot wells. This enabled the latter to produce far more of the reservoir allowable than their share as determined by the basic ⅓-⅔ allocation formula, and the drainage advantage which the small tract operators already enjoyed by virtue of the formula itself was thus substantially enhanced.

An example will serve to illustrate the problem. One of the reservoirs in the Appling Field is designated as Segment 5, 7500′, and 18 wells were completed therein. Seven-

teen of these wells were located on 7.132 acres, while the remaining well was situated on a 328-acre unit. Since the 17 small tract wells have a large aggregate delivery capacity, their operators were able to make correspondingly large forecasts for the month of July, 1964. The total delivery capacity of all 18 wells was approximately 898,000 MCF per month, and the production forecasts resulted in the determination that reasonable market demand, and hence the reservoir allowable, for the month was approximately 880,000 MCF. Under the basic ⅓-⅔ allocation formula, the large tract well was entitled to an allowable of 591,000 MCF, but the productive capacity of the best well completed in the reservoir was approximately 87,000 MCF per month. The productive capacity of the single large tract well was only about 34,000 MCF, and in accordance with the usual Commission procedures some 57,000 MCF were allocated to the town lot wells for the one month in addition to their shares of the reservoir allowable as determined by application of the ⅓-⅔ formula.

Aluminum Company of America requested the Commission to amend Statewide Rule 31 as applied to the Appling Field by either (1) establishing a formula for computing the maximum quantity of gas that might constitute market demand for a reservoir, or (2) discontinuing the practice of reallocating the excess allowables of limited capacity wells. The Commission chose the first alternative and entered Special Order No. 2-53,009 adopting Field Rule 11, the relevant portions of which are quoted in the margin.[3]

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[3] "Rule 11: a. The reasonable market demand for the Appling, Segment 5, 7500'; the Appling, Segment 6, 7500'; the Appling, Segment 6, 7600'; the Appling, Segment 6, 7600', Lower; and the Appling, Segment 'A' Kopnicky, Middle Fields, Jackson and Calhoun Counties, Texas, shall be allocated to each well in each field in accordance with the allocation formula for such field.

This is the order now under attack. Its effect is to establish as a ceiling on reasonable market demand the quantity of gas which, when fixed as the monthly reservoir allowable, would permit the well on the largest proration unit, if its delivery capacity were equal to the largest delivery capacity of any well in the reservoir, to receive an allowable it would be capable of producing.

It is unnecessary for us to consider some of the arguments advanced by appellees in support of the trial court's judgment. As we view the case, the basic issue is whether the procedure for determining maximum market demand established by Rule 11 is beyond the authority delegated to the Commission by the Legislature in Article 6008. Appellees rely primarily upon the provisions of Section 12 mentioned above. It is their contention that the statute requires the Commission to determine lawful market demand and then, where waste is not involved, set the reservoir allowable at the amount of the market demand so determined. They insist that Rule 11 is invalid because it fixes an arbitrary limit based upon factors which have nothing to do with market demand.

Appellants emphasize Sections 1 and 22 of Article 6008, which provide as follows:

> "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use

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b. The daily reasonable market demand for gas for each of the mentioned fields shall be the lesser gas volume figure as determined *either* by summation of nominated volumes taken from producers' forecasts, *or* by dividing the reported productive capability as shown on the GWT-2 test of the well exhibiting the greatest ability to deliver gas to normal gathering facilities by the participation factor of the largest proration unit.

c. The monthly reasonable market demand for gas shall be determined by multiplying the daily reasonable market demand by the number of days in the month."

thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

They say that the remainder of the statute, and particularly the sections upon which appellees rely, must be construed in the light of these provisions. Since the declared purpose of the law is the protection of public and private interests by prohibiting waste and compelling ratable production, they contend that the Commission may properly consider the protection of correlative rights as one of the relevant factors in determining reasonable market demand. The Commission takes the position, therefore, that reasonable market demand is the total figure that allows each operator to produce his fair and allocated share of gas from a common reservoir within the framework of the existing allocation formula. Appellants further insist that the reservoir allowable and the individual well allocations are necessarily intertwined and constitute inseparable parts of a single whole. They point out that a reservoir allowable is not reasonable if it results in unreasonable well allocations, and from this premise they argue that the determination of reasonable market demand must be left to the discretion of the Commission so that unique situations such as that existing in the Appling Field can be handled through special regulation.

Appellants make a strong case for granting the Commission power to consider correlative rights in establishing a

reasonable reservoir allowable, but our problem is to determine whether the Legislature has done so. From a reading of Article 6008 and other statutes in pari materia therewith, we agree with appellants that the term "lawful market demand" as used in the third and fourth sentences of Section 12 means reasonable market demand for lawful uses. After considering all the provisions of Article 6008, however, it seems clear to us that the Legislature did not intend to authorize production from a reservoir to be limited to less than reasonable market demand except for the prevention of waste.[4]

Section 10 of the statute makes it the duty of the Commission to regulate daily gas well production "in the manner and method herein set forth." The Commission is then directed in general terms to prorate and regulate production

[4] This conclusion is further supported by the history of our oil and gas conservation laws. The first Texas statute prohibited waste and authorized the Commission to "do all things necessary for the conservation of oil and gas." Acts 1919, 36th Leg., p. 285, ch. 155. It was only after extended controversy that the Legislature adopted the so-called "Market Demand Act" in 1932. Acts 1932, 42nd Leg., 4 C.S., p. 3, ch. 2. This was preceded by the "Anti-Market-Demand Act," which provided that waste "shall not be construed to mean economic waste, and the Commission shall not have power to attempt by order, or otherwise, directly or indirectly, to limit the production of oil to equal the existing market demand for oil." Acts 1931, 42nd Leg., 1 C.S., p. 46, ch. 26. Governor Sterling is reported to have declared that he would veto a bill which authorized limitation of production to reasonable market demand, because he was interested only in preventing physical waste and could not see how limitation of production to reasonable market demand would have the effect of preventing waste. See Hardwicke, Legal History of Proration of Oil Production in Texas, Texas Law Review, 1937 Bar Association Number, p. 99. Against this background, it is rather difficult to believe that when the Legislature finally authorized the Commission to limit production to reasonable market demand, it meant that an even lower figure might be set whenever the Commission concluded that the same would constitute a reasonable reservoir allowable under all the circumstances.

for the protection of public and private interests in the prevention of waste and the adjustment of correlative rights, but the Legislature did not stop with this general grant of authority. Section 11 tells us when the powers granted by Section 10 may be exercised. The Commission is instructed there to regulate and prorate production for the protection of correlative rights "when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission" that potential production is in excess of reasonable market demand. This is a rather clear indication of the legislative intent that the Commission is not to be concerned with correlative rights unless it does make such a finding. It thus appears that the Commission was not intended to have the broad authority and discretion suggested by the provisions of Sections 1 and 22.

The second sentence of Section 12 provides that when the Commission finds that waste exists or is imminent or that the productive capacity of the wells exceeds market demand, it "shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis." If the Legislature had intended for the Commission to fix as the reservoir allowable any amount that might be reasonable under all the circumstances, Section 12 probably would not have gone beyond the first two sentences. See Rudman v. Railroad Commission of Texas, 162 Tex. 579, 349 S.W.2d 717. Instead of stopping at that point, however, the lawmakers spelled out in some detail how the Commission's duty to regulate gas production is to be performed. It is directed to determine each month: (1) the lawful market demand for gas to be produced from the reservoir during the following month; and (2) the volume of gas that can be produced from the reservoir and from each well therein during such month without waste.

The statute then provides in plain language that the monthly reservoir allowable of gas shall be fixed at the lawful market demand therefor or at the volume that can be produced without waste, whichever is the smaller quantity. In allocating the reservoir allowable among the wells, the Commission is authorized by Section 13 to consider the size of the tracts, the productive capacity of the wells, and "all other factors which are pertinent." It seems rather significant then that the Commission was not given similar authority in fixing the reservoir allowable.

The Legislature undoubtedly contemplated that each well would receive its fair share of the gas produced, but it also specified the means by which that end is to be accomplished. In our opinion the fixing of the reservoir allowable is controlled by the clear and explicit terms of Section 12, and the authority granted to the Commission in that respect is not enlarged by the more general provisions of Sections 1 and 22. "The correction or relaxation of the Section 12 requirements is a legislative matter if the allowables fixed by the Commission pursuant thereto are seriously fallible." Rudman v. Railroad Commission of Texas, supra.

In adopting the order now in question, the Commission has set an arbitrary limit on reasonable market demand for gas from the reservoir and hence upon the reservoir allowable. The limit is based upon factors which have nothing to do with market demand, and we agree with the trial court that the order is beyond the power delegated to the Commission by the Legislature. Appellants point out that Rule 11 will serve to reduce or eliminate any distortion in the reservoir allowables resulting from well bore communication or exorbitant forecasts, but this is purely incidental. The formula prescribed thereby is not related in any way to the quantity of gas passing between the reservoirs or to the amount by which the forecasts might be regarded as excessive.

We do not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the Producers' Forecasts for the month. Use of these nominations is merely an administrative device, and the Commission may consider and give appropriate weight to all facts that are relevant to a determination of reasonable market demand.

Appellants cite Railroad Commission of Texas v. Rowan Oil Co., 152 Tex. 439, 259 S.W.2d 173, Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961, and Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W.2d 935, 87 S.W.2d 1069, 101 A.L.R. 1393. The opinions in these cases contain general expressions regarding the discretion vested in the Commission and its power to regulate production to protect correlative rights, but none of them throws any light on the question now before us. Appellants also direct our attention to the opinion in *Benz-Stoddard*, where it was said that the validity of Rule 37 and the exception thereto is based upon the principle that the Railroad Commission can so regulate the flow of gas that no unreasonable hardship need result from its application. We adhere to that view, but this Court is not authorized to enlarge the powers granted to the Commission by the Legislature.

It is also argued that the summary judgment was improper because there is no showing that the reservoir allowable determined for any month by use of the procedure provided in Rule 11 was less than the actual reasonable market demand for that month. Appellants cite Railroad Commission of Texas v. Houston Natural Gas Corp., 155 Tex. 502, 289 S.W.2d 559, as supporting this argument. In that case a rate established by the Commission was attacked as confiscatory, and we held that the manner in which the Commission arrived at its results was not material if the rate actually yielded a fair return. The decision might be

in point if the present suit had been brought for the purpose of questioning the reservoir allowable fixed for a particular month, but here we are concerned with an order which prescribes the use of an illegal method for determining the allowable at all times in the future. The order is subject to attack even though the reservoir allowable calculated in accordance with its provisions for a certain month might not be substantially more or less than the reasonable market demand for gas from the reservoir.

The judgment of the trial court is affirmed.

DISSENTING OPINION

SMITH, Justice.

I respectfully dissent. By Special Order No. 2-53,009 dated February 1, 1965, the Commission prescribed a formula to be used in determining the maximum reasonable market demand for *five reservoirs* in the Appling Field. Woods Exploration & Producing Co., Inc., et al., instituted this suit against the Commission to test the validity of the order and enjoin its enforcement. Ben Novak and others intervened as plaintiffs. Claire Benz-Stoddard intervened as plaintiff. Aluminum Company of America, Crown Central Petroleum Corporation and others intervened as defendants and aligned themselves with the Commission in an effort to uphold the order.

Plaintiffs and defendants filed motions for summary judgment. The trial court sustained plaintiffs' motion and entered a judgment that "• • • the ruling of the Railroad Commission on November 4, 1964 and the formal order thereon by the Railroad Commission dated February 1, 1965, being Special Order #2 53,009, effective December 1, 1964, adopting a new procedure for determining the maximum limit on the daily reasonable market demand from the five gas reservoirs, being Appling (Seg. 5) 7500'

field, and the Appling (Seg. 6) 7500′ field, the Appling (Seg. 6) 7600′ field, and the Appling (Seg. 6) 7600′ lower field, and the Appling (Seg. A) Middle Kopnicky Field, situated in Calhoun County, Texas, is not within the statutory authority of the Railroad Commission under Sections 10, 11, and 12, Article 6008, R.C.S. and the undisputed facts and is therefore null and void."

This Court has upheld the trial court judgment. This action of the Court effectively withdraws from the Commission the power granted it by the Legislature to consider correlative rights in establishing a reasonable reservoir allowable. I do not agree with the Court that Article 6008[1] or any section thereof either expressly or by implication withholds from the Commission the power to adjust correlative rights. The history of Article 6008 and other statutes in pari materia does not warrant the drastic holding made herein. I will agree that the Court has narrowed the question, but the result reached is destructive in that it takes from the Commission every semblance of power that this Court has in past decisions recognized that it possessed. The Rudman opinion is the Court's principal authority. That case, as I will later demonstrate, involved no issue concerning the fixing of the field allowable for the field there involved. The plaintiffs cite authorities[2] which have no application here. Those are cases wherein the definition of market demand was reached in dealing with statutes relating to market demand for oil. The market demand for

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[1] All statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes.

[2] Danciger Oil & Refining Co. of Texas v. Railroad Commission of Texas, Tex.Civ.App., 49 S.W.2d 837 (1932) reversed at 122 Tex. 243, 56 S.W.2d 1075 (1933); Railroad Commission v. Continental Oil Co., 157 S.W.2d 695 (Tex.Civ.App.1941, err. refused, w. o. m.); Colorado Interstate Gas Co. v. State Corporation Commission of Kansas, 192 Kan. 2, 386 P2d 266 (1964).

oil is usually determined on a *state-wide basis* pursuant to Article 6049d, Section 6, and Article 6014, rather than on a field-wide or reservoir basis pursuant to Article 6008.[3]

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[3] Art. 6008. "Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"• • •

"Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month.

"• • •

"Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

Sections 1 and 22, especially, and even Section 12, do not limit the power of the Commission to enter only such orders as prevent waste. To the contrary the Article specifically directs the Commission to give consideration to protection of correlative rights.

The Commission was confronted with the type of evil mentioned in Section 1 when it adopted the order under consideration. The Commission realized that the undisputed facts warranted action to protect correlative rights and that without the order some of the owners of gas in the reservoirs here involved would not be able to obtain their fair share and would not be able to *produce* and *use* their fair share of the gas in the five reservoirs described in the order. Since the facts are undisputed, I deem it sufficient to state here excerpts from the affidavits of Kenneth B. Ford, affidavits 1 and 2 of Bob R. Harris and the affidavit of James E. Werner, all of which were attached to and in support of Defendants' motion for summary judgment.

Kenneth B. Ford's affidavit dated April 24, 1965, gives the following summation which shows the true picture at the time of entry of the order under attack.

> "13. My study of producer's forecasts, allowables, and production for small tract wells (two acres or less) in these five reservoirs shows that at the present time [April 24, 1965] and for the past several years, these operators of small tract wells, with few exceptions, have been nominating and/or receiving allowable for and/or producing each month more gas than was originally in place under their tracts in these reservoirs.
>
> "14. Based on the facts presented in this Affidavit, it is clear that the special conditions that exist in these five Appling Field Reservoirs do not exist outside the Appling Field in any reservoir in Railroad Commission Districts 2, 3 and 4 and that statewide procedure as outlined in Statewide Rule 31 is not adequate for

> these special conditions. For this reason, Special Field Rule 11 writen by the Commission is reasonably necesnary for effective and fair regulation in these fields."

Ford's affidavit refers to information received from James E. Werner, Senior Geologist, since January, 1956. Werner's affidavit, attached to Railroad Commission's motion for summary judgment, recites that he had made an extensive study of all geological data in the Appling Fields, including induction electric logs on all wells, and micro-logs, core analyses, formation test results, sonic logs and formation density logs from all wells where such logs tests and analyses were obtained.

Affidavit No. 2 by Bob R. Harris, an employee of the Railroad Commission states:

> "The Aluminum Company of America application was to amend the Commission's procedure for determining maximum reasonable market demand for *all reservoirs* in the Appling Fields, but the evidence submitted at that time was not sufficient in the opinion of the Commission to justify applying it to all reservoirs. This is the reason the order applied only to the 5 reservoirs covered by the order."

Werner's affidavit states:

> "I have prepared structure maps of the productive area of the gas reservoirs referred to below [the five involved] based on this study, and have determined by planimeter the number of productive acres in each reservoir. The results of this are set out below."

Werner's affidavit shows the results of these tests to be as follows:

"APPLING (SEGMENT A, KOPNICKY, MIDDLE) FIELD

> "The Appling (Segment A, Kopnicky Middle) Field is the deepest reservoir in the Appling Fields, and also

by far the largest. The other productive reservoirs, including those referred to below, lie above the Middle Kopnicky Sand. In my opinion, this reservoir originally contained 4,288 productive surface acres, of which Aluminum Company of America, Crown Central Petroleum Corporation and Pocantico Oil & Gas Corp. (Alcoa et al) have approximately 3,702 acres under lease. I have prepared an isopach map of the original net effective sand which is productive of gas in this reservoir, which was furnished to Mr. Kenneth B. Ford, a petroleum reservoir engineer, to enable him to determine net effective acre feet of productive sand.

"APPLING (SEGMENT 5, 7500′) FIELD

"In my opinion, the Appling (Segment 5, 7500′) Field is a reservoir originally containing 435 productive surface acres, of which Alcoa et al have under lease approximately 385 acres. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Ken neth B. Ford.

"APPLING (SEGMENT 6, 7500′) FIELD

"In my opinion, the Appling (Segment 6, 7500′) Field is a reservoir originally containing 352 productive surface acres, of which approximately 310 acres are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford.

"APPLING (SEGMENT 6, 7600′) FIELD

"In my opinion, the Appling (Segment 6, 7600′) Field is a reservoir originally containing 485 productive surface acres, of which 443 acres are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford.

"APPLING (SEGMENT 6, 7600′, LOWER) FIELD

"In my opinion the Appling (Segment 6, 7600′, Lower) Field is a reservoir originally containing 525 productive surface acres, of which 481 are under lease to Alcoa et al. I have determined the net productive sand thickness in each of the wells in this reservoir and furnished this information to Mr. Kenneth B. Ford."

The Harris affidavit no. 1 as well as the affidavits heretofore discussed vividly portray the probable imminent evils contemplated in Section 1, Article 6008, supra, which would have resulted had the Commission elected to continue the normal procedure of determining the monthly allowable for each prorated gas reservoir in the Appling Field area. The Commission was confronted with the necessity of determining whether to continue utilization of the procedures set out in Statewide Rule 31(c) and (e) or whether to discard the normal procedure and adopt in its place a method which under the undisputed evidence would adequately protect correlative rights and a method "deemed necessary to restrict the production of gas to an amount equal to market demand as is required of the Commission by the statutes." See the Exception in Rule 31. This was a special condition and the market demand order relates to the five Appling Field reservoirs. The Railroad Commission expressly found and recited in the order under attack that:

"From evidence adduced at said hearing, it was apparent to the Commission that procedure in use for determining the market demand for gas from the mentioned fields provided a means by which an operator could distort the market determination to such an extent that Commission proration and ratable take orders were rendered completely ineffective; that the resulting

injury to correlative rights could be adjusted by modifying the market demand procedure; that the suggested alteration in the procedure for determination of reasonable market demand as modified by the Commission would reduce the ability to manipulate and distort the reasonable market demand determination for the fields."

This Court should bear in mnd that the order under attack was not entered as the result of our holding in the case of Railroad Commission of Texas v. Aluminum Company of America, supra. The market demand order is in no sense an attempt to circumvent our decision. The plaintiffs' claim that such is the purpose of the order is wholly unfounded. The Railroad Commission order in the Aluminum Company case was effective January 30, 1961, whereas the Railroad Commission order in the present case was issued effective December 1, 1964. The order under attack is based on occurrences after January 30, 1961. The Railroad Commission order in Aluminum was entered on the basis of facts and conditions which existed on January 30, 1961, when the order became effective. When the order under attack was entered many material changes had occurred between January 30, 1961, and May, 1964. The prior order did not and could not adjudicate conditions existing on December 1, 1964, or the valdity of an order effective on that date.

The hearing which preceded the adoption of the order under attack was held on December 5 and 6, 1963. On November 4, 1964, the Commission ordered its adoption, effective December 1, 1964. The Examiner, who conducted the hearing for the Railroad Commission, determined from an examination of the producers forecasts allowable schedules, production reports and well test reports filed with the Commission by operators of many wells on small tracts, that they were following the practice of filing producers

forecasts, combined with the forecasts of the other operators, causing the customary (Rule 31) Commission procedure for determining allowables to result in classification of wells located on larger tracts as limited capacity wells (wells unable to produce the allowable which would normally be assigned thereon), and the small tract wells received allowables for greater than the *share of reservoir allowable* they would have received pursuant to the ⅓ per well–⅔ acreage allocation formula in effect in the field.

The undisputed evidence conclusively establishes that in order to protect correlative rights, the Commission not only had the power under authority of the Legislature to adopt the order, but it would have been derelict in its duty if it had failed to so act. I think this case presents a state of facts which the Legislature intended for the Commission to adjust so as to ultimately give to each operator, small or large, his fair share of the gas in the reservoir. The condition here, so far as correlative rights are concerned, are analogous to the conditions described in the cases of Brown v. Humble Oil & Refining Company, 126 Tex. 296, 87 S.W.2d 1069, 1070, 101 A.L.R. 1393 (1935); Corzelius v. Harrell, 143 Tex. 509, 186 S.W.2d 961 (1945); Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73 (1939); Magnolia Petroleum Co. v. Railroad Commission, 128 Tex. 189, 96 S.W.2d 273 (1936); Railroad Commission of Texas v. Manziel, 361 S.W.2d 560, 93 A.L.R.2d 432 (Tex. 1962).

In these cases, the Court was concerned with the question of the extent the Legislature had clothed the Commission with the power to regulate oil and gas production under the Texas Conservation Statutes. In Corzelius v. Harrell, supra, this Court said:

> "The law under consideration states in detail the manner and method the Commission may follow in pro-

> rating and regulating the daily gas well production from each common reservoir. The Legislature recognized the difficulty of prorating and regulating the production of gas from a common reservoir. *To make sure that the Commission was not to be bound by any narrow, technical rules in carrying out the objects of this law, the Legislature was particular to give the Commission broad discretion in the exercise of its power under the provisions of this law.*" [Emphasis added.]

In Brown v. Humble, supra, on motion for rehearing, this Court emphasized the broad and liberal standards to be applied to the conservation orders of the Railroad Commission and stated that the duty is lodged with the Commission to make rules to carry out the mandates of the Legislature and to impartially enforce them. We further said that all rules and rulings of the Railroad Commission are presumed to be valid unless the contrary is made to appear.

These cases announce principles in keeping with repeated statutory declarations of the broad discretion vested in the Commission. See Section 22, Article 6008, supra. Another such statutory declaration is to be found in Article 6042, wherein it is provided:

> "Particular powers herein granted to the Commission shall not be construed to limit the general powers conferred by law, and until set aside or vacated by some order or decree of a court of competent jurisdiction, all orders of the Commission as to any matter within its jurisdiction shall be accepted as prima facie evidence of their validity."

In the case of Railroad Commission v. Rowan Oil Co., 152 Tex. 439, 259 S.W.2d 173, 176 (1953), we said that:

> "All property is held subject to a valid exercise of the police power. That some operators will have a less

> profitable operation, be delayed in recovering their gas, or be in trouble with their creditors does not affect the Commission's duty to enforce conservation by preventing waste. Neither does it make the Commission's action arbitrary or confiscatory if correlative rights are protected."

As heretofore pointed out, Rule 31 itself expressly reserves the power of the Commission to make any modifications or adjustments that the Commission in its discretion deems necessary to prevent waste *or to protect correlative rights.*

The Manziel case, supra, was one brought by the Manziels attacking a Railroad Commission order on the grounds that it would cause waste, that it would result in the confiscation of the Manziels' property, that the permit was not necessary to protect the correlative rights of the Whelans and that the order was in violation of the Commission's own rules. The Manziels contended that the Railroad Commission's order authorizing the Whelans to drill a well at an irregular location was violative of Article 6029(4). The Commission took the position that it must have the authority to grant the location of water injection wells to prevent drainage and to protect correlative rights. Here the Commission was confronted with a situation where it had adopted no field-wide spacing rule for water injection wells, but had made special orders as to each operator desiring to flood. In Manziel, we upheld the order of the Commission, saying:

> "The Commission has two primary duties in the administration and control of our oil and gas industry. It must look to each field as a whole to determine what is necessary to prevent waste while at the same time countering this consideration with a view toward allowing each operator to recover his fair share of the oil

in place beneath his land. In carrying out these duties, there has devolved upon the Commission the power to promulgate rules, orders and regulations that control the industry, and such are issued pursuant to the police power of the state, and that power may invade the right of the owner of the land to the oil in place under his land as long as it is based on some justifying occasion, and is not exercised in an unreasonable or arbitrary manner. See Brown v. Humble Oil and Refining Co., 126 Tex. 269, 83 S.W.2d 935, 87 S.W.2d 1069, 99 A.L.R. 1107, 101 A.L.R. 1393 (1935)."

In view of these repeated judicial and statutory declarations of the broad powers and discretions vested in the Railroad Commission by the Legislature, it is inconceivable that this Court at this late date would hold that the Commission has *no power* to fix the Appling Field allowable in a manner that will result in reasonable individual well allocations and some degree of increased protection for the correlative rights of the Intervenor-Defendants.

I find no case which sustains the plaintiffs in their contention that the Railroad Commission has *no power* to consider the protection of correlative rights or to employ methods designed to see that each individual well gets its *fair share* of the total production from the common gas reservoir in fixing allowables. The Commission is not strictly limited to the clerical function of running up the mathematical total of the producers' forecasts in determining the field allowable. The Court seems to indicate that the Rudman case, supra, so holds. I have hurriedly examined the Rudman record and feel safe in saying that it does not. That case merely holds that the field allowable must be determined in advance of the month to which it is applicable and that it cannot be determined retroactively after the month has expired.

At this time I forego writing upon the question of whether or not the Commission's and the other defendants' motions for summary judgment should have been granted. I would, however, reverse the judgment of the trial court.

NORVELL and HAMILTON, JJ., dissent.

DISSENTING OPINION

HAMILTON, Justice.

I respectfully dissent. The Court's opinion graphically sets out the mass confiscation of property and the gross injustice that results from an enforcement of Rule 31 prior to the amendment that is under attack here. According to Rule 31 before amendment the principal factor to be considered in determining reservoir market demand is the sum total of all gas which producers say they expected to produce the following month and submit on Producers' Forecasts.

What caused the rule to break down, resulting in the chaos described in the Court's opinion, was that producers of gas from small tracts (in most cases 1/10 of an acre) did not confine their forecasts to the volume of their own gas which they expected to produce the following month. In most of such cases a producer would say in effect that he had a sale for all the gas he could produce under the field proration formula, but in addition he could produce and sell more than ten times that much more gas belonging to his neighbors. By taking the sum total of such Producers' Forecasts the Commission was not considering the market demand for gas which the producers had available for sale under the field proration formula as established by Rule 5, but was taking into consideration the gas of other owners, which the producers had no right to offer for sale or to produce. It is evident that consideration of this factor could

not furnish any reasonable basis upon which the Commission could determine the true lawful market demand for gas to be produced from the reservoir under the existing regulations.

The Commission came to the conclusion that in considering and determining the market demand for gas to be produced from each reservoir that it should consider only so much of the Producers' Forecasts as would not exceed the amount of gas which producers could lawfully produce from the reservoir under the allocation formula set out in Rule 5. This is all that Rule 11, the amendment under attack here, seeks to accomplish. It adds another factor to be considered by the Commission in arriving at the lawful demand. It allows the Commission to determine market demand for the gas to be produced from the reservoir under regulation rather than for gas produced at full capacity of the wells.

The real question, then, before the Court is what gas does the Commission take into consideration in determining lawful market demand at its monthly hearings. Does it take into consideration gas to be produced at full capacity of the wells in each reservoir or gas to be produced from each reservoir under the field regulations then in existence? If we determine that the Commission is correct in considering only the gas that can be lawfully produced under the regulations already in existence at the time of its hearing, then the problem with which the Court struggles in its opinion never does arise.

In determining whether the Commission is correct in its approach to this problem we must bear in mind that before the Commission ever had any right to exercise the broad powers the Legislature granted it to prorate and regulate the production of gas it first had to be determined that the capacity of the wells to produce gas from the reservoir in

question exceeded the market demand for gas from such reservoir. This finding was made some years ago and the Commission proceeded as the statute directs by orders to promulgate rules and regulations governing the production of gas from each reservoir. These regulations established spacing rules and, for the reservoir in question, it established a 320-acre spacing unit rule with a proviso for exceptions to Rule 37, under which the Commission has granted 17 exceptions in order to prevent confiscation of gas. Then in order to prevent excess drainage from regular size units by these small units the Commission adopted Rule 5, which is the ⅓ - ⅔ proration formula, ⅔ of production based on acreage, and ⅓ on per well factor. It is this rule that automatically puts a limit on the maximum amount of gas which can be produced from each well, and consequently a limit on the maximum of production of gas from each reservoir.

It is only after all these things have been done by the Commission that it then at the direction of the Legislature has a hearing on or before the 20th of each month to determine the lawful market demand for gas to be produced from each reservoir for the following month. The lawful producing capacity of each reservoir has already been determined. The Legislature necessarily had in mind that this would have been done before the Commission was called upon to determine the lawful market demand. It necessarily follows that the Legislature, when it said "to determine the lawful market demand for gas to be produced", had in mind the gas to be produced under the regulations then in force.

All that Rule 11, the amendment under attack, does is to say that as to the Producers' Forecasts it will consider so much of the forecasts as does not exceed the amount which

the producer can lawfully produce under the regulations in force. If they do not exceed such amount, then the Commission will fix the market demand at the sum total of the Producers' Forecasts. If they do exceed such amount, then the Commission will fix the lawful market demand at the maximum which the producers could produce under the regulations.

It can be seen that the Commission is not arbitrarily fixing the market demand, but is fixing it in the light of all the facts and circumstances before it at the time it is called upon to make the determination. The Commission considers not only the nominations of purchasers and Producers' Forecasts, but also the supply of gas that may be lawfully produced from the reservoir. All these factors bear on the lawful or reasonable market demand the Legislature had in mind when it directed the Commission to determine the lawful market demand for gas to be produced from the reservoir.

This Court, in making its holding, says:

> "In adopting the order now in question the Commission has set an arbitrary limit on reasonable market demand for gas *from the reservoir* and hence upon the reservoir allowable. The limit is based upon factors which have nothing to do with market demand * * *." (Emphasis mine.)

In the first place, the statute does not direct the Commission to determine the reasonable market demand for gas *from the reservoir*, but it is for the gas *to be produced* from the reservoir. This means a reservoir which is necessarily already under proration, or else the Commission would not be called upon by such statute to determine any market demand. Consequently, the market demand, with which we are concerned here, is for gas to be produced from

the reservoir under proration. The Court is holding as a matter of law that the Commission cannot consider the supply of gas as is limited by proration in determining market demand, and has stricken the order of the Commission, which in effect says that the Commission will consider nominations and Producers Forecasts, but only to the extent that they do not exceed the maximum amount that can be produced under proration, as fixed by the Commission. This is a strange holding, in view of the fact that the Commission would have no power or authority whatever, in a case where waste is not involved, to determine market demand, unless it did relate to correlative rights. Any such order of the Commission establishing the factors to be considered in determining lawful market demand would be without authority if it did not concern correlative rights. Section 1, Article 6008, is as follows:

> "Sec. 1 In recognition of past, present, and imminent evils occurring in the producing and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by *prohibiting waste and compelling ratable production.*" (Emphasis mine.)

By this provision and others the Legislature has said in no uncertain terms that the Commission may promulgate orders and rules only when they have some reasonable relation to the prohibition of waste or the compelling of ratable production among the owners of gas in a common reservoir. The Supreme Court of the United States, in Thompson v. Consolidated Gas Utilities Co., 300 U.S. 55, 57 S.Ct. 364, 371, 81 L.Ed. 510, in affirming the lower courts which had held invalid an order of the Texas Rail-

road Commission ostensibly issued under the authority of Article 6008, R.C.S., said this:

> "Proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary."

The whole opinion of this Court shows that it misses the entire purpose and reason for the existence of Article 6008. The very basis of any power given the Railroad Commission is to prevent waste or to protect correlative rights. Consequently, in analyzing Section 12 of Article 6008, after the Commission has determined that facts exist which give it authority to proceed to prorate and regulate oil and gas production, then everything the Commission does thereafter under Section 12 has to be either related to correlative rights or waste. The Commission is given no authority to establish any rule or order which does not have some reasonable relation to one or the other. Consequently, when this Court says that Rule 11 which is under attack here is invalid because it has the effect of protecting correlative rights it is doing so in the face of the plain purposes and provisions of the statute.

The Court, in arriving at its holding, not only ignores the above-quoted Section 1 of Article 6008, but also ignores Section 22 of said article, which reads as follows:

> "Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law."

It is interesting to note how the opinion treats the provisions of Sections 1 and 22 as mere suggestions and

comes to the conclusion that the Legislature had no intention of giving the Commission the broad authority and discretion contained in the provisions of said sections. The Court reaches its conclusion through an analysis of Sections 10 and 11 of Artcle 6008, which read as follows:

> "Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interest:
>
> "(a) In the preventon of waste as 'waste' is defined herein;
>
> (b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.
>
> "Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.
>
> "The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservior, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article."

The Court, after noting the powers granted the Commission in Section 10 to regulate and prorate production

for the protection of correlative rights "when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission", that potential production is in excess of reasonable market demand, it then makes this statement:

> "This is a rather clear indication of the legislative intent that the Commission is not to be concerned with correlative rights unless it does make such a finding."

That statement is just as true as it can be, but what the opinion fails to say is that the Commission did make that finding; it did become concerned with correlative rights; it did promulgate a proration order covering the reservoirs here involved, which is Rule 5, to protect correlative rights. Once the Commission made the finding that potential production is in excess of reasonable market demand all the broad powers and discretion conferred upon the Commission to prorate and regulate production of oil and gas came into effect. Yet the Court's opinion says that, because the Commission first had to make that finding, "It thus appears that the Commission was not intended to have the broad authority and discretion suggested by the provisions of Sections 1 and 22." It is difficult to see how the Court can conclude, from the reasons it gave, that the Legislature did not mean what it said.

I disagree with the Court's definition of "lawful market demand" as used in that part of the sentence in Section 12 as follows: "* * * shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; * * *." The Court defines it as "reasonable market demand for lawful uses." It does mean that, but it means more in the context in which it is used. I would add to the Court's definition "and lawfully produced." As stated above, there was in effect at the time

the Commission promulgated the amendment now under attack a valid and subsisting proration order covering the reservoirs in question. This order is not under attack here and is still in force. Until set aside it has the effect of law. Section 16 of Article 6008 says: "It shall be unlawful for any person to produce gas from a gas well in violation of the valid orders of the Railroad Commission of Texas."

While the Court says that it does not mean to suggest that reasonable market demand must always be fixed at the mathematical total of the Producers' Forecasts for the month and that the Commission may consider and give appropriate weight to all factors that are relevant to the determination of reasonable market demand, they are rather empty words. The Court holds that the Commission may not consider correlative rights as a factor in the determination of market demand. In view of this holding of the Court there is no way in which the Commission can protect correlative rights. If Woods Exploration Company and a small pipe line can destroy correlative rights in the reservoirs in question it is unthinkable what larger pipe lines can do to gas fields all over this state wherever there are small tract owners located.

The Court says in effect that the Legislature gave broad powers to protect correlative rights to the Commission throughout the statutes on oil and gas but took it away with one stroke of the pen when it wrote this one phrase "shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; * * *." This in spite of the fact that the Legislature nowhere told the Commission what it must or must not consider in determining lawful market demand. The effect of this holding is to destroy, in so far as gas fields in which there are small tract owners are concerned, the power of the Commission to protect correlative rights.

This Court has said numerous times contrary to the present ruling that the Commission has broad powers in so prorating and regulating oil and gas production as to protect correlative rights. Railroad Commission v. Shell Oil Company, 380 S.W.2d 556, at 559; Marrs v. Railroad Commission, 142 Tex. 293, 177 S.W.2d 941; Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73; Atlantic Refining Co. v. Railroad Commission, 162 Tex. 274, 346 S.W.2d 801; Halbouty v. Railroad Commission, 163 Tex. 417, 357 S.W. 2d 364.

I would reverse the judgment of the trial court.

SMITH and NORVELL, JJ., join in this dissent.

RAILROAD COMMISSION OF TEXAS ET AL.,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA ET AL.,

Respondents.

No. A-9760.

Supreme Court of Texas.

May 27, 1964.

Rehearing Denied July 15, 1964.

CULVER, Justice.

Respondents, Aluminum Company of America, Crown Central Petroleum Corporation, Carl E. Siegesmund, and Sun Oil Company, (Alcoa et al.), in this suit attack and seek to set aside the Railroad Commission's order of April 24, 1961, allocating the allowable production of oil and gas in the Appling Field in Calhoun and Jackson Counties. This order prorates the production of gas on the basis of ⅓ per well and ⅔ on the acreage assigned to the well and prorates oil on a 50% per well and 50% acreage basis. The grounds of the attack are that this order results in and permits enormous drainage to town lot and other small tract wells from under respondents' lands and that this drainage will continue unless the Commision's order is set aside. Alcoa et al. assert that they own approximately 3,700 acres of the total productive area of the Middle Kopnicky reservoir and as of June 30, 1961, had 22 wells producing therefrom; that at the same time there were 30 town lot wells with total assigned area of 25 acres; that the average per well allowable for the small tracts is 43 times the average per acre allowable for standard unit tracts in the Middle Kopnicky. These allegations are proven without substantial dispute.

A number of intervenors aligned themselves with the Railroad Commission in urging that the order be upheld. The trial court adjudged that the order of the Commission was not supported by substantial evidence, was therefore null and void and enjoined its enforcement. The Court of Civil Appeals affirmed. 368 S.W.2d 818. We here reverse the judgments of the courts below and hold the Commission's order to be valid.

The Appling Field consists of 10 separate sands for the most part overlying one another. All of these sands produce gas and condensate with a few small oil reservoirs interspersed. The principal sand, known as the Middle Kopnicky, is the deepest producing sand and by far the thickest and most prolific reservoir. It contains 80% of the gas reserves in the entire area. The nine other sands are progressively higher and overlie the producing area of the Middle Kopnicky. The discovery well in the Appling Field was completed as a gas producer in the Middle Kopnicky in 1953. In 1956 the Commission for the first time adopted for this field the gas allocation formula of ⅓ per well and ⅔ per acreage. The order also provided for a 320-acre gas well spacing unit and a 40-acre oil well spacing unit. At that time several town lots or small tract wells had been drilled and were in production.

Thereafter and prior to January 19, 1960, the Commission promulgated at various times as the individual reservoirs were discovered, the same proration formula for each. No appeals were taken by Alcoa or by anyone else from any of these orders. In fact, the evidence shows that Alcoa during this period had at least once recommended that very same formula to the Commission for adoption.

On January 19, 1960, Alcoa et al., petitioned the Commission to hold a hearing and to revise the oil and gas allocation formulas for these reservoirs which the Commission had theretofore promulgated. After hearings were held

and the matter considered at length the Commission entered the order here under attack. It recited that the rules theretofore adopted should be revised and redrawn into one single order for all of the reservoirs and that all former orders were superseded and rescinded. By the terms of that order, however, the Commission refused to modify or change in any way the proration order which had first been promulgated in 1956 or any of the eight subsequent special field orders and expressly continued in force the ⅓-⅔ formula. It may be noted here that the amount of oil reserves in the field is negligible and the parties have concerned themselves, therefore, almost exclusively with the matter of the gas reservoirs and the formula applicable thereto.

The principal point argued by the Commission and its aligned intervenors is that the evidence shows as a matter of law that Alcoa et al. were barred by unreasonable delay, laches and estoppel from seeking to set aside and revoke the order continuing the ⅓-⅔ allocation formula for gas production, and that the courts below erred in holding that these defenses are not applicable to suits attacking proration orders of the Railroad Commission. Their position is based primarily on the statement in our decision commonly referred to as the Normanna[1] case as follows:

> "We are in agreement with the reasoning of the courts in the Humble and Standard Oil Company cases in holding that where producers have acquiesced in and have failed to complain of the Commission's proration orders for a long period, during which time other operators have expended vast sums in exploration and drilling operations, such producers should not be heard to complain."

While this staement is properly to be regarded as dictum since it was not necessary to the decision in the case, nevertheless it was said deliberately, to put the Commission

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[1] Atlantic Refining Co. v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W.2d 801, 811.

and the industry as a whole on notice that the holding therein did not require the overturning of proration formulas that had been in effect in other fields for years where operators had drilled and completed wells at great expense in reliance on those formulas and where conditions had become stabilized. Otherwise, not only would confusion and serious injustice result in many instances, but an intolerable burden would be cast upon the Commission. Thousands of producing wells have been drilled on small tracts in Texas oil fields as exceptions to Rule 37 in hundreds of fields in which the ⅓-⅔ formula has been adopted and which tracts have produced far more hydrocarbons than underlaid those tracts originally. There are said to be more than 300 productive gas fields in the State which are now and have been currently operating under this formula.

The question decided in Normanna was for the first time squarely presented to this Court. We there held that the ⅓-⅔ proration formula promulgated by the Commission for the Normanna Field was invalid because it allowed a well on a .3-acre tract to produce gas at a rate many times greater per acre than a well on a standard spacing unit. It did not come close to ratable production nor did it afford each operator in the field an opportunity to produce his fair share of the gas from the reservoir. On the contrary it would result in the uncompensated drainage of a tremendous quantity of gas and condensate from other leases and tracts in that field to the small tract upon which the defendant had drilled its well.

The theory of the Normanna decision as expressed in the quoted language is that its holding is to be applied prospectively and not retrospectively. This prospective application of Normanna is in harmony with the statute[2] which authorizes appeals from any rule, regulation or order promulgated by the Commission. Although this statute fixes no time

[2] Vernon's Ann.Civ.Stat., Art. 6049c. § 8.

limit for an appeal, yet by providing that such suits shall be advanced for trial and be determined as expeditiously as possible, and that no postponement or continuance shall be granted except for reasons deemed imperative, it clearly evidences a legislative intent that those suits must be brought within a reasonable time. Dunbar v. Fuller, Tex.Civ.App., 253 S.W.2d 684, writ ref.; Midas Oil Co. v. Sanolind Oil Co., 142 Tex. 417, 179 S.W.2d 243; Board of Water Engineers v. Colorado River Municipal Water District, 152 Tex. 77, 254 S.W.2d 369. In the last case where no appellate steps were taken for a period of seven months, the appeal was held to be untimely, even though the Board order may not have been reasonably supported by substantial evidence and had the appellees proceeded with diligence, they might have been enabled to obtain the relief sought.

Alcoa insists that the decisions such as Midas Oil Co. v. Stanolind have no application to the problem here presented because there is a basic difference between a Commission order establishing a field-wide allocation rule and and order granting an exception to a Rule 37 permit in that the granting of the permit fixes a vested right while the allocation orders do not.. We concede that distinction, but nevertheless we believe the law, as announced therein, is pertinent to the facts here.

Unquestionably the Commission's power to regulate oil and gas production in the interest of conservation and protection of correlative rights in a continuing one and its orders are subject to change or modification where conditions have changed materialy, new and unforeseen problems arise or mistakes are discovered. Magnolia Petroleum Co. v. New Process Production Co., 129 Tex. 617, 104 S.W.2d 1106; Railroad Commission v. Humble Oil & Refining Co., Tex. Civ. App., 193 S.W.2d 824, writ ref. n. r. e. It is equally true that no land owner or operator acquires any vested

right to continue to produce the same amount of oil or gas during the life of such well as was fixed by the proration schedule in force at the time he drilled his well. The regulation of the production of oil and gas is a valid exercise of the state police power. Texas Trading Co. v. Stanolind Oil & Gas Co., Tex.Civ.App., 161 S.W.2d 1046; Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573, 60 S. Ct. 1021, 84 L.Ed. 1368.

What we do say is, however, that in appealing from any order of the Railroad Commission one must proceed with reasonable diligence. The course pursued by Alcoa in this case in moving for a modification of the long-standing ⅓-⅔ formula and then taking an appeal from a denial of that motion for all practical purposes, and so far as the interests of the parties are concerned, differs in no material respect from a present attempt to appeal from the original 1956 order and the ones that followed. Alcoa had the right to seek a revision of these orders, but only upon a showing of changed conditions and a resultant necessity therefor.

There have been no material changes nor have unforeseen problems arisen, affecting proration in the Appling Field, that in our opinion would compel the Railroad Commission to modify or rescind the proration orders promulgated prior to January 19, 1960. As pointed out above, the effect of the Commission's order complained of here was merely the refusal to set aside the orders that had theretofore been adopted. At the time of the first field proration order in 1956 it appears that five wells had been drilled in the area on small tracts. This drilling under the Rule 37 exception continued until thirty wells had been brought into production prior to May 18, 1959, and others had been completed before Alcoa filed its application before the Board. The cost of drilling per well ranged from ninety to two hundred thou-

sand dolars. From the testimony it appears that Alcoa could reasonably have concluded in 1956 that many town-lot tracts lay within the proven territory. Alcoa knew that as a matter of law each town-lot owner, or at least many of them, would in all probability be entitled to one well as exceptions to Rule 37.

Beginning in 1954 there were negotiations between Alcoa et al. and some of the small-tract owners concerning the matter of pooling and unitization. There is evidence to the effect that Alcoa and its associates refused some such offers from small-tract owners. There is evidence that the Carancahua Townsite in 1955 was surrounded by four or five wells that had been drilled by Alcoa which indicated that the townsite was a proven potential area for production and that the area was being drained by the Alcoa wells at that time.

Likewise there were negotiations between the intervenor, Sun Oil Company, and some town-lot owners in the Port Alto Subdivision looking to unitization and pooling agreements. These two town-lot areas spread over about 150 acres and were divided into more than 200 lots. All of these facts undoubtedly were fully known to Alcoa and the other respondents at the time of the promulgation of the first order in 1956 and they must have fully appreciated the almost certain probability of the drainage that would necessarily follow from completions on town lots in the productive area.

It is true that a number of these townlot wells owned by some of the petitioner-intervenors have been drilled and brought into production subsequently to January 19, 1960, when Alcoa et al, first applied to the Commission for a revision and modification of the existing proration orders. In fact all of the wells of two of these intervenors had been

so drilled. Three of these intervenors had completed all of their wells earlier. But the fact that some of these wells were drilled after they were put on notice of Alcoa's application is not material to a solution of the problem here. It could not affect adversely those operators whose wells were drilled earlier. We are dealing here with a field-wide rule. Whether or not there is any authority vested in the Commission to apply exceptions to a field-wide rule in some cases, that relief is not here sought by Alcoa. They seek to strike down the order as applicable to the entire field.

In Standard Oil Co. v. Railroad Commission, Tex.Civ. App., 215 S.W.2d 633, n.r.e., Standard filed its application with the Commission seeking a modification of the Yates Field proration formula which had remained in effect without substantial change for nearly nine years theretofore. On page 638 of that opinion the Court points out:

> "* * * From the very nature of a proration formula, and the magnitude of the interests therein, both public and private, it ineluctably follows that the Commission has the affirmative right, when challenged in an appropriate judicial proceeding, to have its validity established, and the continuing uncertainty removed, which would result from the untrammeled right of the challenging party, from whatever cause, to bring its validity (except for changed conditions) again in issue. * * *"

From that premise Alcoa et al. argue that laches and delay do not apply to field-wide proration orders in that, they say, the Court holds that Standard had the "untrammeled right" to attack the order on any grounds and at any time they saw fit. We do not agree with that argument. Standard's principal contention in that cause was that having moved for a non-suit it was entitled as a matter of law to a dismissal of the entire suit without prejudice. The Court held, however, that the Commission having prayed that these orders be sustained, it was entitled to a judicial

determination of their validity to set at rest any uncertainty in that respect. The Court is not saying, as we construe its language, that Standard after long delay does have the untrammeled right to put in issue the validity of the proration formula absent changed conditions.

Alcoa et al. contend that there is no evidence to show that any well owner on any small tract in this field has failed to obtain already from his allotted production the entire cost of his drilling and maintenance operations, together with some profit, and therefore it would be wholly unfair and unjust to permit a continuation of drainage from their properties which has up to the present time and will in the future result in a total loss to them of gas and condensate to the value of several million dollars. Even this argument, persuasive as it is, does not convince us that this Court should interfere with the administration by the Railroad Commission of the production from this field where small tract drilling has been conducted and large sums expended in reliance on the formula that had been in force without objection for a period of four years.

There are many reasons why stability in respect to proration formulas is vital to the well being of the industry as a whole, to the property owners in the field and to the public at large. It is a matter of common knowledge that well owners are not alone concerned. Individuals and institutions have invested in royalties and in other oil and gas interests. Loans have been made with these properties as security, and taxes have been levied by various municipal and school authorities. It is well known that the economy of the whole state rests to a large extent on the oil and gas business.

For the reasons above expressed we uphold the Railroad Commission's order of April 24, 1961. The judgments of the trial court and the Court of Civil Appeals are reversed and judgment here rendered that respondents take nothing.

CLAIRE BENZ-STODDARD ET AL.,

Petitioner,

v.

ALUMINUM COMPANY OF AMERICA,

Respondent.

No. A-9137

Supreme Court of Texas.

May 8, 1963.

Rehearing Denied June 12, 1963.

HAMILTON, Justice.

This is a suit brought by Aluminum Company of America to cancel a Railroad Commission order granting a Rule 37 exception permit to prevent confiscation of the minerals underlying Claire Benz-Stoddard's .115-acre town lot. The trial court sustained special exceptions to the petition and, when Aluminum Company refused to amend, dismissed on the ground that the petition did not state a cause of action for cancellation. The Court of Civil Appeals reversed and remanded. Tex.Civ.App., 357 S.W.2d 809. Claire-Benz-Stoddard and the Railroad Commission are petitioners.

We reverse the judgment of the Court of Civil Appeals and affirm the judgment of the trial court.

Since this case comes to us on a special exception in the nature of a general demurrer we must accept respondent's allegations as true. The allegations are as follows:

Underlying Claire Benz-Stoddard's .115-acre tract are ten vertically separated gas reservoirs, or horizons, among which there is no communication of gas. Multiple comple-

tion techniques make it possible to produce gas from as many as six of these reservoirs though only one well bore. The Commission's order granted Claire Benz-Stoddard's request for permit to drill one well and to make multiple completions in as many reservoirs as were productive. The order recites that the permit is granted to prevent confiscation and/or waste", but the parties agree that there was no issue of waste in this case, only of confiscation. Respondent alleged that because of the proration order in effect at this field at the time the permit was granted (⅓ of the allowable allocated on a per well basis and ⅔ allocated on a per acre basis), a single completion well during its life would make it possible for petitioner to recover more than her equivalent of the minerals in place in all ten reservoirs under her land, thus would fully protect her against confiscation. Respondent further alleged that petitioner has in fact made triple completions and has already recovered more than seven times the gas in place beneath her tract in all ten reservoirs, 84% of which has been drained from respondent's portion. Respondent did not allege that petitioner has access to any one of the ten reservoirs by means of another well on another tract. Respondent alleged that this was a voluntary subdivision but expressly waived and abandoned that allegation before the trial court.

The Court of Civil Appeals held that petitioner was entitled to an opportunity to recover the equivalent of her share in the ten reservoirs beneath her tract — not the specific minerals—and that since under the proration order in effect at the time the permit was granted she could with a completion in only one reservoir recover more than enough gas to make up her equivalent in all ten reservoirs, she was as a matter of law not entitled to multiple completions. In support of this holding the Court of Civil Appeals cites Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d

73; Atlantic Refining Co. v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W.2d 801; Railroad Commission of Texas v. Williams, Tex., 356 S.W.2d. 131; and Halbouty v. Darsey, 326 S.W.2d 528 (Tex.Civ.App.1959), writ ref'd n. r. e.

Petitioner Claire Benz-Stoddard contends that it is immaterial that she could with one completion recover from a single reservoir an equivalent of her fair share of the gas in all ten reservoirs lying beneath her tract.. She further argues that if allowing multiple completioms will cause unreasonable drainage of respondent's landss, respondent has recourse by way of attack on the proration order, not by attack on the exception permit.

Respondent argues that our decisions in Willliams, supra, and Coloma Oil & Gas Corp. v. Railroad Commission of Texas, Tex., 358 S.W.2d 566, compel us to hold that once it has been shown that a single completion willl afford petitioner an opportunity to recover her fair share of the gas in all ten reservoirs, there is not as matter of law substantial evidence to support a finding of necessity for multiple completions to prevent confiscation. In other words, respondent contends the Commission must treat petitioner's fair share of the gas in ten separate reservoirs as if it were all contained in one reservoir. Respondent does not contend that Claire Benz-Stoddard is not entitled to a "first well", only that she is not entitled to completions in more than one reservoir.

The question before us is: Where a tract of land overlies several vertically separated gas reservoirs, shall the Railroad Commission, in applying the exception to Rule 37, treat the several reservoirs separately or as one? We hold that the Railroad Commission was correct in treating them separately and therefore the facts alleged by respondent do not state a cause of action for cancellation off the permit allowing multiple completions.

Petitioner Claire Benz-Stoddard has mineral property in ten separate reservoirs and is entitled to a Rule 37 exception permit in each reservoir if she has shown that confiscation will result. We must presume that the Railroad Commission has found that confiscation would result. Article 6049c, Vernon's Ann.Tex. St. Respondent does not allege that there will be no confiscation in each reservoir when considered separately.

The Williams and Coloma cases, supra, upon which the Court of Civil Appeals relies, do not support respondent's contention here. We wish to point out that in each of those cases this court held in effect that the applicant for the exception to Rule 37 already had a well within the same reservoir and drainage area as the second tract for which the permit was sought, and that the well already in existence could produce and drain from the second tract the oil or the equivalent of the oil in place under such tract, and that the second well was not necessary to prevent confiscation of applicant's oil in the common reservoir. The distinction is simple. In each of those cases there was one common reservoir, while in the case before us there are several separate reservoirs.

We think that Article 6008, V.A.T.S., which authorizes the Railroad Commission to regulate the production of gas contemplates that the Railroad Commission will treat reservoirs of gas underlying the same tract of land separately. Section 4(a), reads as follows:

> "If oil and/or gas be produced through different strings or casing set in the same well bore, the inner string through which oil and/or gas be produced shall be regarded as one well, and each successive additional string of casing through which oil and/or gas shall be produced, from a different producing horizon, the others producing through the same well bore, shall be regarded as another well."

We think this section authorizes the Railroad Commission to treat a completion in each reservoir as a "first well". In Section 12, Article 6008, we find this language:

> "The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced *from the reservoir,* * * *." (Emphasis added.)

The granting or denial of a Rule 37 exception permit in a "first well" situation has never been held to depend upon the quantity of gas which may be allowed to be produced from the well or whether the granting of such permit may result in drainage from adjoining owners. See Atlantic Refining Co. v. Railroad Commission of Texas, 330 S.W.2d 494 (Tex.Civ.App.1959), writ ref'd n.r.e.; Halbouty v. Darsey, 326 S.W.2d 528 (Tex.Civ.App.1959), writ ref'd n.r.e.; Foster v. Railroad Commission, 326 S.W.2d 533 (Tex. Civ.App.1959), writ ref'd n.r.e.

We realize that the granting by the Railroad Commission of the multiple completion order under the general proration order in effect in the field does create a situation in which grave injustice may be done the respondent. However, we do not feel that the solution of the problem lies in denying the application of the exception to Rule 37 to each separate reservoir underlying petitioner's land. In the case of Brown v. Humble Oil & Refining Company, 126 Tex. 296, 83 S.W.2d 935, at page 944, this court, in discussing the validity of Rule 37 said:

> "Conditions may arise where it would be proper, right, and just to grant exceptions to the rule so as to permit wells to be drilled on smaller tracts than prescribed therein. * * * but in all such instances it is the duty of the commission to adjust the allowable, based upon the potential production, so as to give to the owner of such smaller tract only his just proportion of the oil and gas. * * *

"* * * This right to control the rate of flow in order to prevent waste also enables the commission to offset the advantage obtained by one who is given an exception to the spacing rule by limiting his allowable production to the extent necessary to overcome this advantage. In this way the commission, by controlling the oil stored in the common reservoir, is enabled to carry out the dominant purpose of preventing waste, and, at the same time, permit each owner to enjoy the opportunity fully to realize upon his estate by developing and recovering his oil and gas. We therefore hold that the Railroad Commission has the power, under the conservation statutes, to promulgate a spacing rule, as was done, regulating the drilling of oil wells, and to provide for an exception to the rule to protect vested rights and to prevent waste; and the exception to the rule is not too uncertain or indefinite so as to render the rule invalid. No unreasonable hardships need result, if the rule is faithfully and impartially applied by those authorized by law to administer it."

It can be seen that the very validity of Rule 37 and the exception thereto is based upon the principle that the Railroad Commission can so regulate the flow of the gas that no unreasonable hardship need result from its application. This court reiterated this principle in Atlantic Refining Company v. Railroad Commission of Texas, 162 Tex. 274, 346 S.W.2d 801, and Halbouty v. Railroad Commission of Texas, Tex., 357 S.W.2d 364.

We hold, therefore, that since the Commission is authorized to treat each completion in a separate reservoir as a separate well, it may grant multiple completions in each reservoir in which it finds there will be confiscation. The allegation that under the existing proration order petitioner will recover more gas from her land through one completion than underlies her land in all the reservoirs does not amount to a denial of the presumed finding by the Commission that there will be confiscation in each reservoir.

We therefore reverse the judgment of the Court of Civil Appeals and affirm that of the trial court dismissing respondent's cause of action.

TEXAS REVISED CIVIL STATUTES ANNOTATED

Art. 6008. Production and use of natural gas

Declaration of policy

Sec. 1. In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

Definitions

Sec. 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article to wit:

(a) "Commission" means the Railroad Commission of Texas;

(b) "Person" means any natural person, corporation association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind;

(c) The term "Common Reservoir" as used in this Article shall mean any oil and/or gas field or part thereof which comprises and includes any area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of oil and/or gas;

* * *
* * *

Commission to make and enforce rules and regulations

Sec. 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purposes of this Article, including rules, regulations, or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of natural gas in drilling and producing operations and in the piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such way as to confine natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

(5) To prevent natural gas and water from escaping from the strata in which they are found into other strata.

(6) To require records to be kept and reports made.

(7) To provide for the issuance of permits, and other evidences of permission when the issuance of such permits,[1] or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law.

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[1] So in enrolled bill. Session Laws duplicate words "or permission when the issuance of such permits."

Commission to prorate and regulate daily production

Sec. 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interest:

(a) In the prevention of waste as "waste" is defined herein;

(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

Commission to exercise authority, when

Sec. 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

Determination of status of gas production; proration and regulation

Sec. 12. It shall be the duty of the Commission to determine the status of gas production from all reservoirs

in this state. If and when the Commission finds that waste exists or is imminent in the production of gas from any reservoir, or that the capacity of the wells to produce gas from any reservoir exceeds the market demand for gas from such reservoir, the Commission shall then proceed by proper order to prorate and regulate the gas production from such reservoir on a reasonable basis. On or before the 20th day of each month, the Commission, after notice and hearing, shall determine (1) the lawful market demand for gas to be produced from each such reservoir during the following month; and (2) the volume of gas that can be produced from such reservoir and each well therein during the following month, without waste. The Commission shall then fix the monthly reservoir allowable of gas to be produced from such reservoir at the lawful market demand therefor or at the volume that can be produced from such reservoir without waste, whichever is the smaller quantity. The monthly reservoir allowable shall be allocated among all wells entitled to produce gas therefrom so as to give each well its fair share of the gas to be produced from the reservoir, provided that each well shall be restricted to the amount of gas that can be produced from it without waste. The volume of gas so allocated to each well shall be regarded as the monthly allowable for such well. The daily market demand for gas, and the daily allowable, shall be determined by dividing the monthly demand and the monthly allowable by the number of days in the month. As amended Acts 1947, 50th Leg., p. 1059, ch. 453, § 1.

Factors in determining daily allowable production

Sec. 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily produc-

ing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at twenty-five per cent (25%) of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

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Discretion of Commission

Sec. 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

Penalty and suits to enforce

Sec. 23. Any person violating any of the provisions of this Article shall be liable to a penalty not to exceed One Thousand Dollars ($1,000) for each offense, and each day's violation shall be a separate offense. Such penalty may be recovered by the State of Texas with the cost of suit in a civil action instituted in Travis County or in the County

where the violation occurred by the Attorney General or by the County or District Attorney when joined by the Attorney General of Texas; and any and all violations or threatened violations of this Article may been enjoined by any Court of competent jurisdiction in which the suit for penalty may be brought, and in such cases the Court may issue such writs of injunction, mandatory or prohibitory, as the facts justify.

Appeals to courts

Sec. 24. Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article, in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1525

ALUMINUM COMPANY OF AMERICA,, ET AL,
Petitioners,
v.
WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents.*

BRIEF OF WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEVERT J. ABLE
1201 First National Life Bldg.
Houston, Texas 77002

MANDEL & WRIGHT
HERMAN WRIGHT
1901 First National Life Bldg.
Houston, Texas 77002

TOM F. COLEMAN, JR.
1201 First National Life Bldg.
Houston, Texas 77002

Attorneys for Respondents
WOODS EXPLORATION & PRODUCING COMPANY, INC., STANLEY C. WOODS, SOUTHEASTERN PIPELINE COMPANY

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents.*

BRIEF OF WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The slip opinion of the Circuit Court of Appeals, March 13, 1975, No. 72-2792, sought to be reviewed, is set out in Petitioners' Appendix, pages 107-128. Motions for Rehearing and for Rehearing En Banc were denied April 24, 1975 (Petitioners' Appendix, page 129).

The opinions of the trial court and Circuit Court of Appeals providing the justification for denial of this petition are those of (1) the first opinion of the Fifth

Circuit, *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (Petitioners' Appendix, pages 38-96; (2) that of Tom C. Clark, retired Justice of this Honorable Court, who sat specially as the trial judge below (whose opinion, dated February 6, 1973, is not published but appears at pages 97-106 in the Petitioners' Appendix); and (3) the Fifth Circuit Court opinion (dated March 13, 1975, not yet published but appearing at pages 107-129 in Petitioners' Appendix).

Other opinions involving some aspect of this self-same lawsuit not set out in Petitioners' petition are: *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 36 F.R.D. 107 (Judge Ingraham--S.D. Texas, 1963); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 382 S.W.2d 343 (Tex. 1964) n.r.e.

JURISDICTION

As Petitioners indicate in their petition, jurisdiction is predicated on 29 U.S.C. 1254 (1). The petition was filed on June 4, 1975, and counsel for Respondents received a copy of the same on that date.

One searches the petition herein in vain for an indication of its compliance with the considerations set out in *Supreme Court Rule 19.*

QUESTIONS PRESENTED

Stripped of the invectives, the editorializing, and the ostentatious use of adjectives by the Petitioners, the question presented by Petitioners here is whether or not they have finally had their day(s) in court as to this piece of litigation.

This case, in most of its aspects, has now been heard and reviewed by two juries (first trial, six weeks; second trial, one month); two Federal District Court Judges (Ingraham and Singleton)—one on two different occasions (Singleton); one retired Justice of this Honorable Court, sitting specially as District Judge (Tom C. Clark); two different panels of the Fifth Circuit Court of Appeals (Judges Brown, Goldberg, and Clark, first; then, Coleman, Ainsworth, and Simpson); reviewed by the entire Fifth Circuit Court of Appeals twice on motions for *en banc* hearings; by the Texas Court of Civil Appeals, 382 S.W.2d 343, and by the Texas Supreme Court, writ refused, no reversible error (Tex. 1964; holding that "Woods" had a cause of action for "Alcoa's" misuse of the Railroad Commission's processes); and there have been three other opinions of the Texas Supreme Court to which "Woods" was a party (holding that the gas produced by Woods did not involve waste and was legally produced). (Petitioners' Appendix pages 130 to 179).

This Honorable Court has twice before denied writs of certiorari in this protracted litigation—once in *Railroad Commission v. Woods Exploration & Producing Co.* (Tex. 1966), 405 S.W.2d 313 (Petitioners' Appendix, pages 130 to 163), cert. denied sub nom, *Aluminum Co. of America v. Woods Exploration, Inc.,* 385 U.S. 991 (1966), 87 S.Ct. 602, 17 L.Ed.2d 450; and, second, in *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971) (Petitioners' Appendix, pages 38 to 96), where petition from said opinion was docketed in this Court as Cause No. 1712 at the October Term, 1970, and writ of certiorari was denied by this Honorable Court in 1972 in 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed. 736 on "The facts and opinion, D.C. 284 F.Supp. 582; 304 F.Supp. 845; 438 F.2d 1286."

It is doubtful that many petitioners to this Court have had, prior to filing their petitions, such massive due process as the Petitioners here. Their real complaint is that they have not been able to prevail.

STATEMENT

Petitioners, in their "Questions Presented" and in their "Statement of the Case," overstate their case. By way of example, in "Question Presented No. 5" and "Statement of the Case," pages 5 and 8, of their Petition, the Petitioners state that they have not been permitted to develop before any jury their contention as to the drainage and confiscation by Respondents of vast quantities of Petitioners' gas. It is uncontroverted that one of Alcoa's theories at the second trial (the one involved here) was that the extraction plant was not economically feasible at the time construction was proposed because, at the time, Alcoa et al were challenging in the Texas courts the legality of the 1/3—2/3 formula and the Railroad Commission's allowing multiple completions on Woods' small town-lot wells (See Circuit Court opinion pages 122 and 123, Petitioners' Appendix).

The Petitioners again overstate their case by declaring (page 8 and elsewhere in their Petition), that "the first trial verdict was perpetually paraded by the judge and counsel alike before the jury."

For a correct factual background, Respondents respectfully refer the Court to: (1) the first opinion of the Court of Appeals, 438 F.2d 1300 (Petitioners' Appendix, 38-45 and 62-64); (2) the Memorandum Opinion of the Trial Judge on February 6, 1973 (Petitioners' Appendix pages 97-106), and (3) the second opinion of the Court of Appeals on March 13, 1975 (Pages 111-113, Petitioners' Appendix).

REASONS FOR NOT ALLOWING THE WRIT

I. IT WAS PROPER FOR THE JURY IN THE SECOND TRIAL TO BE INFORMED OF THE OUTCOME OF THE PRIOR LITIGATION, SINCE THE ISSUE BEFORE THE JURY IN THE SECOND TRIAL PRESUMED THE EARLIER FINDINGS ON THE MONOPOLIZATION ISSUE.

(Reply to Petitioner's Question Presented for Review #1 and Reason Number I for Allowing the Writ, Petitioner's Petition, pages 4 and 14)

II. THE UNDERLYING PURPOSE OF RULE 54(b) WAS SERVED BY THE CONSOLIDATION OF SEPARATE APPEALS FROM THE JUDGMENT ON THE MONOPOLIZATION ISSUE AND FROM THE JUDGMENT ON THE EXTRACTION PLANT ISSUE, FOR THE PURPOSE OF ORAL ARGUMENT AND DECISION BY THE COURT OF APPEALS, WHERE THE PETITIONERS SUFFERED NO INJURY BY PARTIAL FINAL JUDGMENT UNDER RULE 42(b).

(Reply to Petitioner's Question Presented for Review #2 and Reason Number II for Allowing the Writ, Petitioner's Petition, pages 2 and 15)

III. ON THE SECOND TRIAL, THE COURT PROPERLY REFUSED TO RESUBMIT ANTITRUST LIABILITY TO THE JURY AND LIMITED THE TRIAL TO THE ISSUE OF DAMAGES FLOWING FROM ALCOA, ET AL'S INTERFERENCE WITH THE LIQUID EXTRACTION PLANT THROUGH THEIR CONCERNED ACTIVITY.

(Reply to Petitioner's Question Presented for Review #3 and Reason Number II for Allowing the Writ, Petitioner's Petition, pages 5 and 15)

IV. THE TRIAL COURT PROPERLY DENIED, AT THE FIRST TRIAL, EVIDENCE OF DRAINAGE AND TEXAS SUPREME COURT DECISIONS, WHICH HELD THAT WOODS, ET AL (RESPONDENTS) PRODUCED FROM THE COMMON RESERVOIR MORE GAS THAN THAT UNDERLYING THEIR TRACTS, ON THE ISSUE OF MONOPOLIZATION; WHERE THERE WAS NO DISPUTE OVER THE FACT AND THAT ALL OF THE GAS DRAINED FROM UNDER PETITIONER'S PROPERTY WAS LEGALLY PRODUCED.

V. PETITIONERS WERE NOT DENIED THE RIGHT TO DEVELOP BEFORE ANY JURY THE CLAIMED DRAINAGE AND CONFISCATION OF VAST QUANTITIES OF PETITIONERS' GAS BY RESPONDENT.

(Reply to Petitioner's Question Presented for Review #4 and #5 and Reason Number III for Allowing the Writ, Petitioner's Petition, pages 5 and 16)

VI. THE TRIAL COURT CORRECTLY GAVE INSTRUCTION NO. 32 TO THE JURY, BECAUSE IT FOLLOWED THE HOLDING OF THE U. S. SUPREME COURT AND RELATED TO THE QUESTION OF SOUTHEASTERN'S PREPAREDNESS TO GO FORWARD WITH THE CONSTRUCTION OF THE PROPOSED EXTRACTION PLANT.

(Reply to Petitioner's Question Presented for Review #6 and Reason Number IV for Allowing the Writ, Petitioner's Petition, pages 6 and 16)

ARGUMENT

Petitioners resort to the word, "trifurcated," in a Madison-Avenue effort to mask a specious argument which has been considered and rejected by the Fifth Circuit Court twice and once by Associate Justice Clark (Retired). In fact, the same argument was presented by these Petitioners in their prior petition for certiorari filed from the first opinion of the Fifth Circuit Court of Appeals (404 U.S. 1047).

The simple fact is that the question of liability under the Act (monopolization) was tried to a jury *one* time (304 F.Supp. 845, page 847, 438 F.2d 1286, pages 1290-1291). Growing out of that monopolization, Respondents contended they had been damaged by the monopolization of the Petitioners in "drilling for, producing and transporting gas" (Question No. 2) in two respects: (1) the pipeline and (2) the extraction plant. That first jury was allowed to pass on only one phase of the damage issue—the pipeline. When the Fifth Circuit Court reversed, it simply said that the Respondents should be allowed to prove, if they could, their damages regarding the extraction-plant phase of the damages, which extraction plant had been thwarted by the concerted efforts of Petitioners.

The Trial Judge (Clark) on remand faithfully followed the instructions of the Court of Appeals on this phase of the damages and was affirmed for having done so, by the same Fifth Circuit Court, which had ordered it done.

In one form or another, these Petitioners have repeatedly urged their argument of "drainage and confiscation." Indeed, the second jury spent several days listening to this kind of evidence. It was this very evidence which prompted Justice Clark in Instruction 32 to advise the

jury that lawful acts lost their "character (as such) when they become constitutent elements of an unlawful scheme."

The only newcomer, relatively speaking, to Petitioners' stable of complaints, is as to the verdict in the first trial which retired Justice Clark read to the jury as background to explain the why of the evidence and issues in the second jury trial. Even this has been passed on by the trial judge and the Fifth Circuit panel which decided the case.

I.

IT WAS PROPER FOR THE JURY IN THE SECOND TRIAL TO BE INFORMED OF THE OUTCOME OF THE PRIOR LITIGATION, SINCE THE ISSUE BEFORE THE JURY IN THE SECOND TRIAL PRESUMED THE EARLIER FINDINGS ON THE MONOPOLIZATION ISSUE.

The Court of Appeals (page 121, Petitioners' Appendix) clearly held the above.

The Trial Court's charge to the jury on the prior verdict, was invited by Petitioners. The Trial Court's memorandum opinion reflects the course of events:

> "The Court in the first draft of the charge summarized the jury findings at the first trial concerning defendants' monopolization of the extraction of gas from Appling Field. When the defendants objected that the characterization was not full and complete, the Court then incorporated the whole verdict in the charge. The defendants then objected to the whole charge being read. The case was submitted on the theory that the monopolization charge had been established at the prior trial." (Petitioners' Appendix 104).

Petitioners again overstate their case when they say, on Page 21 of their Petition, that the verdict was admitted for all purposes. The Court instructed the prospective jurors of the very limited purpose of the prior verdict in considering the submitted issues (Circuit Court of Appeals No. 73-1633, Appendix, 565-566). The court in his charge also told the impaneled jury substantially the same thing by Instruction Number 4, only in stronger terms, as follows:

> "Except where it is stated to the contrary in this charge, you are specially instructed that the former jury verdict and the answers therein do not constitute any evidence in this trial and are not to be given any weight or consideration whatsoever by you in arriving at your answers to the issues to be submitted to you for determination. You are instructed that the matters tried in this trial were not tried or passed upon in the former trial and that the issues submitted to you for your verdict were not covered or included in the former trial or in the verdict therein. You are strictly admonished that you are to draw no favorable or unfavorable inferences from the jury verdict in the former trial or any part thereof, either in favor of or against any of the parties to this case, but are to decide the issues put to you strictly on the evidence which you have heard during this trial" (Circuit Court of Appeals No. 73-1633, Appendix, 82-83).

Absent any indication to the contrary, this Court must assume that the jury followed the court's instructions. *Lifetime Siding, Inc. v. U.S.*, 359 F.2d 657 at 661; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 at 485, 53 S.Ct. 252.

Petitioners also overstate their case on Page 21 of their petition, when they say counsel flaunted the prior jury verdict before the second jury and suggested to the second jury that it should do the same thing to Alcoa that the first jury had done. This is denied. However, Petitioners' contention that the trial judge committed reversible error by allowing Respondents' counsel to utilize the prior verdict in their jury arguments, if error at all, is foreclosed by the fact that no objection was interposed to such arguments. *Travelers Insurance Co. v. Bell,* 188 F.2d 725, 726 (5th Cir. 1951); and *Nowell v. Dick,* 413 F.2d 1204, 1212-1213 (5th Cir. 1969).

It is argued, on Page 19 of Petitioners' petition, that the submission of the verdict to the jury was improper because it was not a final, unappealable verdict, and they had in fact appealed such verdict. *International Shoe Mach. Corp. v. United Shoe Mach. Corp.,* 315 F.2d 449 (1st Cir. 1963), cert. den'd 375 U.S. 820 (1963), cited by Petitioners, is not in point. In *International Shoe,* the Court of Appeals sustained the District Court's refusal to accept in evidence the prior government judgment because of the time gap between the activities of the Defendant relied upon by the government and those relied upon by the Plaintiff. Obviously, such a distinction does not exist in the present case.

The cases cited in the footnote on Page 19 of Petitioners' Petition only state the well-established rule that, under § 5(a), the government's decree must be final before admissible in a subsequent civil action.

The portion of the prior jury's verdict to which Petitioners devote the major thrust of their complaint is Question

No. 2, wherein the jury found Petitioners, with F. E. Appling and/or others, monopolized, etc. Any contention by Petitioners that this finding is not final is foreclosed by the decision of the Court of Appeals in 438 F.2d 1286, at 1304, wherein it was held:

> "We find that Plaintiffs have satisfied the evidentiary requirements of the offense of monopolization."

and, at 1307, where it was held:

> "that the jury could find on this state of the facts that defendants possessed monopoly power in the Appling Field within the meaning of the Act."

What other finding of the prior jury can Petitioners complain of as having been improperly submitted to the second jury because not final? Petitioners cannot and would not, of course, complain of the reading to the jury of Finding No. 1, which was favorable to Petitioners.

The jury's answers to Questions 3(a) and 3(c) could not have harmed Petitioners in the instant trial in that such findings related only to Stanley C. Woods, individually, and to Woods Exploration & Producing Company; and, particularly, since the trial court below had instructed the jury in its charge that "Plaintiff Stanley C. Woods and Woods Exploration & Producing Company having introduced no evidence entitling them to have their case submitted to the jury" only as to the Plaintiff, Southeastern Pipeline Company (Instruction No. 42, Circuit Court of Appeals No. 73-1633, Appendix, 97).

Finding 3(b) was favorable to Petitioners and could have redounded only to Petitioners' benefit in the eyes of

the second jury. The same is true of Finding No. 4, that Fred A. Wolcott did not sign Exhibit No. 85-A (7-A in the second trial). In fact, the previous jury's Finding No. 4 was so favorable to Petitioners that they made almost endless attempts to relitigate the same question in the second trial.

The prior jury's Finding No. 5 that Petitioners and F. E. Appling prevented Fred Wolcott from signing Exhibit No. 85-A, was affirmed and ordered reinstated by this Court. It was made more than abundantly clear to the second jury that Southeastern relied on the oral agreement between Robert Topper on behalf of Lumar, and Woods, on behalf of Southeastern, for the construction and operation of the extraction plant. Parenthetically, 7-A was only introduced by Respondents because the trial court stated that it would grant Petitioners' request for a continuance if it were not going to be introduced by Respondents (Circuit Court of Appeals No. 73-1633, Appendix 572, 573).

Respondents submit that it is obvious that the jury in the second trial was advised of the prior jury's findings only in order to remove the void in the trial insofar as the monopolization issue was concerned.

Glen Falls Ins. Co. v. Yarborough, 396 S.W.2d 200 (Tex. Civ. App. 1965), writ ref'd n.r.e., and *Looney v. Traders & General Ins. Co.,* 231 S.W.2d 735 (Tex. Civ. App. 1950) writ ref'd n.r.e., cited by Petitioners, were state court cases and are not factually or procedurally applicable to this case.

Petitioners' real contention is that the jury should not have been informed of the prior jury verdict because Peti-

tioners having appealed from the partial judgment, there was no final judgment; therefore, it was still, so to speak, in limbo. But not so. The jury findings as to monopolization (Question No. 2 of first verdict), the Petitioners' prevention of the use of a joint pipeline with Lumar and the option to participate in the building of a joint extraction plant (Question No. 5 of first verdict) are, in view of the U. S. Supreme Court's denial of a writ of certiorari, as between the parties, as final and binding as any judgment entered on such finding can be.

Further, the reasoning in Sec. 5(a) cases fails in the instant case simply because, if the first verdict should be overturned by the appellate court, then the verdict in the second trial would necessarily also fall. However, when the verdict in the first trial was sustained, then—to all intents and purposes— what was submitted to the second jury by the trial court's charge was, even under Petitioners' theory, a final verdict.

It is not error to acquaint a jury with a prior verdict or proceedings between the same parties. See *Beetler v. Sales Affiliates, Inc.*, 431 F.2d 651, pages 654-655, (7th Cir. 1970), *United States v. Bucon Construction Co.*, 430 F.2d 420, page 425 (5th Cir. 1970), *Gottesmann v. General Motors Corp.*, 414 F.2d 956, pages 963 to 965 (2nd Cir. 1969), cert. den'd 403 U.S. 911, *Cirillo v. Commissioner of Internal Revenue*, 314 F.2d 478, at 482 (3rd Cir. 1964); *Stagecrafters-Club, Inc. v. District of Columbia Division of American Legion*, 111 F. Supp. 127, 128-129 (D.C. 1953), followed in *United States v. Wainer*, 211 F.2d 669, 671 (7th Cir. 1954), cert. den'd 355 U.S. 815.

II.

THE UNDERLYING PURPOSE OF RULE 54(b) WAS SERVED BY THE CONSOLIDATION OF SEPARATE APPEALS FROM THE JUDGMENT ON THE MONOPOLIZATION ISSUE AND FROM THE JUDGMENT ON THE EXTRACTION PLANT ISSUE, FOR THE PURPOSE OF ORAL ARGUMENT AND DECISION BY THE COURT OF APPEALS, WHERE THE PETITIONERS SUFFERED NO INJURY BY PARTIAL FINAL JUDGMENT UNDER RULE 42(b).

In order to meet Petitioners' contention that, somehow or other, the separate trial of the second damage issue (extraction plant) had been tainted by the first jury trial and the partial judgment covering liability and one damage issue (pipeline), the Fifth Circuit Court consolidated the appeal of the Petitioners taken from the entry of the partial judgment (re: the pipeline) which had been previously argued, with their appeal taken from the judgment entered as a result of the trial of the second element of damages (extraction plant). Following such consolidation, further argument was ordered before the court. By this process, the appellate court obviously considered all aspects of Petitioners' objections and, as it said, satisfied the "underlying purpose of Rule 54(b)" (see pages 113 and 114 of Petitioners' Appendix).

28 U.S.C. Rule 42(b) clearly provides for separate trials, in the furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy, of any claim, separate issue, or number of claims or issues, as follows:

> "SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

The appellate court's actions under 28 U.S.C. 2111 make the claimed error harmless. Said rule reads as follows:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

There is no possible harm to Petitioners by the court's entry of the final partial judgment. Since there can be no question but that the trial court was duty bound to reinstate the jury verdict, had the trial court in the exercise of his discretion determined not to enter a final partial judgment, what would have been the status of the case? Certainly, Respondents would have their first verdict. When the trial on the issues as to an extraction plant culminated, as it did, in a verdict for Respondents, the court would then have been duty bound to enter a judgment on both verdicts with interest running from the respective dates of the verdicts, thus reaching the same result.

On the first trial of the case and first opinion of the Court of Appeals, writ of certiorari denied, Petitioners

asserted the right to have an injunction against the prosecution of the state court case and the authority for the partial final judgment was to protect them; and the entry of the trial judge, in the second trial, benefited them as well as Respondents. The Court of Appeals in the first case (pages 84 to 94 of Petitioners' Appendix).

Contrary to the statement on Page 22 and Page 23 of Petitioners' Petition, the Circuit Court of Appeals, writ denied, in the first opinion, did not hold that Respondents' original suit was solely centered on the question of false nominations. It recognized (pages 61 and 62 of Petitioners' Appendix) that in Respondents' Original Petition, Respondents asserted other grounds for recovery besides the false nominations. Also see *Woods Exploration & Producing Company, Inc., v. Aluminum Company of America, et al,* 36 F.R.D. 107, page 112 (1963).

III.

ON THE SECOND TRIAL, THE COURT PROPERLY REFUSED TO RE-SUBMIT ANTITRUST LIABILITY TO THE JURY AND LIMITED THE TRIAL TO THE ISSUE OF DAMAGES FLOWING FROM ALCOA, ET AL'S INTERFERENCE WITH THE LIQUID EXTRACTION PLANT THROUGH THEIR CONCERTED ACTIVITY.

The Circuit Court of Appeals in the second opinion (see pages 119, 120 and 121 of Petitioners' Appendix) held that the extraction plant issue was not so wholly separated as to require the re-submission of the antitrust-liability question to the jury.

Monopolization of the production and transportation of gas from the Appling Field having been established by jury verdict the Defendants' witness Reiss, (Court of Ap-

peals 73-1633 App. 1424), general manager of Alcoa, admitted that the prevention of or restrictions on the production and transportation of gas directly affected and/or prevented the extraction of its by-products, as follows:

> "Q. So then the direct effect of stopping production from the small, town lot owners, if you were successful, you will also be successful in stopping them from using any extraction plant? If it is curtailed, it would make it uneconomical and if it's stopped, it would make it disastrous? That is corect, isn't it? A. Yes, sir."

This admits that the violation of the antitrust laws caused, or at least was likely to cause, the type of loss and injury which the second jury found Petitioners, sustained (Jury's Answer to Question No. Two, second verdict, pages 1(a) and 1(b) of Petitioners' Petition for Writ).

In *Continental Ore Company v. Union Carbide and Carbon Corporation,* 370 U.S. 690, 698, 82 S.Ct. 1404, 1409 the Supreme Court held that a jury, as the trier of the facts, must be permitted to draw from circumstantial evidence (here, direct) the inference that the necessary causal relationship exists.

There can be no question that, the Court of Appeals in 438 F.2d 1286, page 1307, established Petitioners' monopolization of the production and transportation of gas in the Appling Field. The Trial Judge in the second trial of this case, was duty-bound to follow that court's decision. *Consumers Petroleum Co. v. Consumers Co.,* 176 F.2d 441, 442 (C.A. 7th Cir. 1949); *D.C. Federation of Civil Associations v. Volpe,* 459 F.2d 1231, 1267 (C.A. D.C. 1972). *White v. Murtha,* 377 F.2d 428 Pages 431, 432 (C.A. 5th Cir. 1967).

No one reading the Court's opinion in 438 F.2d 1286 can reach any other conclusion but that as to the extraction plant antitrust liability was held to have been established and need not be retried. There is a wealth of authority supporting a remand for the determination of one of several damages issues without again resubmitting the other damage issues or the issue of liability. *Thorpe v. National City Bank of Tampa,* 274 F. 200 (C.A. 5th Cir. 1921); *Mass. Bonding & Insurance Co. v. J. R. Thompson Co.,* 88 F.2d 825, 832 and 833 (8th Cir. 1937), cert. denied 301 U.S. 707; *American Alliance Insurance Company v. Brady Transfer and Storage Co.,* 101 F.2d 144, 151 (8th Cir. 1939); and *Ocean Accident & Guarantee Corp. v. Penick & Ford, Ltd.,* 101 F.2d 493, 500 (8th Cir. 1939). *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* (M.D. Pa. 1960) 185 F. Supp. 826, 828, affirmed 281 F.2d 481 (3rd Cir.) cert. denied, 364 U.S. 901, 939, 81 S.Ct. 234-237 (Nov. 21, 1960); and *LoCicero v. Humble Oil & Refining Co.,* 52 F.R.D. 28 (E.D. La. 1971); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 91 S.Ct. 1434 (1971); *Washington Gas Light Company v. Connolly,* 214 F.2d 254 (C.A. D.C. 1954); *Thompson v. Camp,* 167 F.2d 733 (C.A. 6th 1948); *May Department Stores Co. v. Bell,* 61 F.2d 830 (C.A. 8th Cir. 1932).

Forty-two years ago the Supreme Court of the United States laid down the law which permits a separate trial on unresolved issues. *Gasoline Products Co., Inc. v. Champlin Refining Co.,* 283 U.S. 494, 51 S.Ct. 513 (1931) in which the Court said:

> "Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact that requirement does not

compel a new trial of that issue even though another and separable issue must be tried again." (Page 515)

See also *Furr v. Herzmark,* 206 F.2d 468, 472 (C.A. D.C. 1953); *Morehead v. Poland,* 457 F.2d 694, 696 (C.A. 7th Cir. 1972); Federal Rules of Civ. Pro., Rule 42(b), Separate Trials and Rule 59(a).

IV.

THE TRIAL COURT PROPERLY DENIED, AT THE FIRST TRIAL, EVIDENCE OF DRAINAGE AND TEXAS SUPREME COURT DECISIONS, WHICH HELD THAT WOODS, ET AL (RESPONDENTS) PRODUCED FROM THE COMMON RESERVOIR MORE GAS THAN THAT UNDERLYING THEIR TRACTS, ON THE ISSUE OF MONOPOLIZATION, WHERE THERE WAS NO DISPUTE OVER THE FACT AND THAT ALL OF THE GAS DRAINED FROM UNDER PETITIONERS' PROPERTY WAS LEGALLY PRODUCED.

V.

PETITIONERS WERE NOT DENIED THE RIGHT TO DEVELOP BEFORE ANY JURY THE CLAIMED DRAINAGE AND CONFISCATION OF VAST QUANTITIES OF PETITIONERS' GAS BY RESPONDENT.

The Supreme Court early held in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.,* 310 U.S. 573, 60 S.Ct. 1021, 84 L.Ed. 1368 (1940), that the Supreme Court of the United States would not interfere with the rulings of the Railroad Commission of Texas and the regulatory

statutes of Texas even though the Railroad Commission orders permitted drainage of oil and gas from under adjoining tracts, in the absence of waste. Also see *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 61 S.Ct. 343 (1941).

The Circuit Court of Appeals, in its second opinion (Petitioners' Appendix 114-116), held that the exclusion from the jury of two Texas Supreme Court decisions was proper.

The market demand opinion of the Supreme Court of Texas (Petitioners' Appendix, pages 130 to 163) is the result of an appeal from the granting of a motion for a summary judgment which required the court to assume the worst side of the case as to Woods and to assume facts most favorable for Alcoa on drainage. Further, a Petition for Writ of Certiorari was filed in the U. S. Supreme Court by Alcoa to review that state court opinion and was denied by the U. S. Supreme Court sub nom, *Aluminum Co. of America v. Woods Exploration, Inc.*, 385 U.S. 991, 87 S.Ct. 602, 17 L.Ed.(2) 450 (1955). The Court's attention is called to the fact that the Supreme Court of Texas specifically held (page 133 of Petitioners' Appendix):

> "Waste is not involved, and there is nothing in the record to suggest that any gas produced from the Appling Field has been devoted to unlawful uses."

When Woods became interested in the Appling Field, he was aware that the Railroad Commission had set the 1/3—2/3 formula; and, on that basis, Woods Exploration and its investors invested considerable sums of money to drill for the gas, always projecting the probable return

under the applicable rules existing in the field. In *Railroad Commission v. Alcoa,* 380 S.W.2d 599 (1964, Petitioners' Appendix, pages 169 to 172) the Supreme Court of Texas took cognizance of the fact that Alcoa aided in establishing this very rule, and acquiesced in it for a long time without complaint. The Texas Supreme Court held that, after such a long time, it would be inequitable to overturn the formula where operators had drilled and completed wells at great expense in reliance on such formula and where contracts had become stabilized.

The trial judge, in the second trial, on motion for new trial filed by the Petitioners, overruled their point on the introduction of evidence of drainage. (See 3[b] and [d] Petitioners' Appendix, pgs. 104-105).

VI.

THE TRIAL COURT CORRECTLY GAVE INSTRUCTION NO. 32 TO THE JURY, BECAUSE IT FOLLOWED THE HOLDING OF THE U. S. SUPREME COURT AND RELATED TO THE QUESTION OF SOUTHEASTERN'S PREPAREDNESS TO GO FORWARD WITH THE CONSTRUCTION OF THE PROPOSED EXTRACTION PLANT.

The trial court correctly gave Instruction No. 32, because it followed the holding of the U. S. Supreme Court decision in *California Motor Transport, Inc. v. Trucking Unlimited,* 44 U.S. 508 (1972); and the Court of Appeals, in its second opinion (Petitioners' Appendix 122-123) which held that the Instruction was clearly related to the question of Southeastern's preparedness to go forward with the construction of the extraction plant and to

the question of the relation of the overall monopolization finding in the first trial to the damages resulting from frustrating of the building of Respondent's extraction plant.

The trial court, in overruling Petitioners' motion for new trial, clearly set out why Instruction No. 32 was proper and supported by the evidence (3(e) page 105, Petitioners' Appendix).

Such instruction was proper because it related to Southeastern's contention of an overall and general intent on the part of Petitioners to destroy Southeastern's business or property in the Appling Field, and did no more than inform the jury that *if* the action taken by the Petitioners before the Railroad Commission and the courts was pursuant to a combination and for the purpose of harassing and deterring Southeastern, such could be considered in connection with whether or not Petitioners had an intent to frustrate and thwart construction of the extraction plant.

Nor did the court's instruction in anyway unfairly characterize the *Normanna* and *Claire Benz-Stoddard* cases, nor instruct the jury that they should conclude that these lawsuits constituted violations of the antitrust laws. In fact, the Trial Court in Instruction No. 11 told the jury that "The said Defendants, of course, had a right to take such actions." Circuit Court No. 73-1633, App. 85 and 86). This one sentence in Instruction No. 11 nullifies Petitioners' contention that Instruction No. 32 was erroneous.

Petitioners next contend that Instruction No. 32 was erroneous because in the first case Judge Singleton had determined that the Petitioners' motive for filing the law-

suits and taking action before the Railroad Commission was not illegal in that there was "probable cause" for such action. Petitioners contend these conclusions of Judge Singleton were binding on Justice Clark in the second trial as the law of the case. All the opinion of Judge Singleton in 284 F.Supp. 582 held was that the Respondents were not entitled to recover *as damages* "any loss or expense which they might have suffered as a result of any litigation identified in this opinion concerning the validity of Railroad Commission rules, regulation, or orders." (Page 595). Southeastern has made no claim in this suit to recover *as damages* any legal costs, court costs, or attorneys' fees in connection with the matters referred to in Judge Singleton's opinion. The fact that Petitioners might have probable cause to believe that the challenged Commission orders were invalid in no way immunizes them to combine and conspire in a course of conduct the purpose of which was to drive Southeastern out of business. The Court of Appeals, in reversing Judge Singleton's various actions and decisions, at no point enunciated any principles of law regarding action taken by the Petitioners before the Railroad Commission in seeking a change in orders or new orders or in the institution and prosecution of litigation. A matter not decided by an Appellate Court does not become the laws of the case. *Hartford Life Ins. Co. v. Blincoe,* 255 U.S. 129, 136 (1921) and *Mutual Life Insurance Co. of New York v. Hill,* 193 U.S. 551; *Miller's Mut. Fire Ins. Ass'n of Illinois v. Bell,* 99 F.2d 289, 292 (8th Cir. 1938). Moreover, our own Texas courts in *Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, et al,* 382 S.W. 2d 343 n.r.e., cognizant of all of the Texas decisions relied on by Petitioners as proof that it could not have monopolized the production and transportation of gas in

the Appling Field, nevertheless held that Respondents did have a cause of action under the antitrust laws for misuse of Railroad Commission procedures and the courts.

United States v. First National Bank and Trust Co. of Lexington, 263 F.Supp. 268 (E.D. Ky. 1967) cited on page 34 of Petitioners' petition is not applicable in this case. In that case there was a full trial on the merits. Not so in 284 F.Supp. 582. Petitioners also cite *Smith v. Pittsburgh Gauge and Supply Co.,* 323 F.Supp. 256 (W.D. Pa. 1971). If Petitioners had gone a step further and read the opinion of the Third Circuit Court of Appeals (464 F.2d 870 [1972]) affirming the District Court they would have discovered that the *Smith* case does not stand for the proposition for which Petitioners cite it but on the contrary supports Respondents in their contention that Judge Singleton's opinion in 284 F.Supp. 582 (1968) on these "probable cause" matters was in no way prohibitive of Justice Clark submitting Instruction No. 32 to the jury in the second trial.

D. C. Federation of Civil Assoc. v. Volpe, 459 F.2d 1231 (D.C. Cir. 1972), cited by Petitioners, also lends no support to their contentions. There the Court of Appeals simply held that their decision on a *previous appeal of* the same case which required a remand to the District Court for hearing, when no Supreme Court review was sought, became the law of the case.

CONCLUSION

As we read Rule 19 of this Court, the only possible "consideration" there listed which could be urged as cause for the Court to exercise its "sound judicial discretion" and grant a review herein on certiorari is to be found in the last part of 1(b):

> "Where a Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

It seems to us that the Fifth Circuit Court of Appeals in its two opinions (Petitioners' Appendix 38-96 and 107-129), taking into account the memorandum opinion of retired Justice Clark (Petitioners' Appendix 97-106), amply demonstrate that this litigation has been handled, insofar as Petitioners are concerned, well within the "accepted and usual course of judicial proceedings" and well within the intent and purpose of the antitrust laws of the United States. The Petitioners certainly fail to disclose any substantive reason for prolonging this litigation beyond its present age of thirteen (13) years. Respondents respectfully urge the proposition that the opinions of the Court of Appeals at long last lay this litigation to rest on solid legal principles and recognized authorities as expressed in the decisions of this Honorable Court. It is, therefore respectfully prayed that Petitioners' Application for Writ of Certiorari be denied.

Respectfully submitted,

LEVERT J. ABLE
1201 First National Life Bldg.
Houston, Texas 77002
(713) 224-6033

HERMAN WRIGHT
MANDEL & WRIGHT
1901 First National Life Bldg.
Houston, Texas 77002
(713) 225-6033

TOM F. COLEMAN, JR.
1201 First National Life Bldg.
Houston, Texas 77002
Attorneys for Respondents,
WOODS EXPLORATION & PRODUCING COMPANY, INC., STANLEY C. WOODS, SOUTHEASTERN PIPELINE COMPANY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the 26th day of June, 1975, on attorneys for Petitioners, pursuant to Rule 33(1) of this Court, by placing three (3) copies of the foregoing brief in opposition to Petitioners' Petition for Writ of Certiorari in the U. S. Mail, first class, postage prepaid, addressed to counsel of record for Petitioners, at his post office address of record, thus serving all parties required to be served.

LEVERT J. ABLE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,

Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,

Respondents.

REPLY BRIEF OF PETITIONERS

JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

Of Counsel:
ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, HOUSTON

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REPLY BRIEF OF PETITIONERS

PRELIMINARY STATEMENT

Respondents' brief reveals the paucity of arguments that can be mustered to support their claims. They do not seriously challenge Petitioners' contention that the outcome of the second trial was never in doubt after the court decided to read to the jury the entire verdict of the first jury as "background." The reaction of the antitrust jury, which was told by the court that a prior jury in a related case had found Petitioners to be monopolists, to have refused to deal with Respondents and to have harrassed them, was predictable. The court later compounded its error by permitting counsel for Respondents to refer throughout the trial and during final argument to the prior jury verdict. It was inevitable that after the jury was told Petitioners had been adjudicated law violators, it would believe

Respondents' witnesses over Petitioners' on the hotly contested issues of fact, and would be strongly influenced to be consistent with the first jury. It was thus no surprise when the jury found that Petitioners' pre-established monopoly had caused the demise of Respondents' proposed extraction plant and awarded the precise amount of damages sought by Respondents.

The unfairness of the court's unprecedented use of the prior verdict is patent. This unfairness is magnified when it is realized that the monopoly verdict, which was repeatedly paraded before the jury, was returned after a trial in which all evidence on Petitioners' market share of the gas drilled, produced and transported in the Appling Field — the markets which the jury found they monopolized — was excluded. The only evidence before the jury of Petitioners' market power was that they leased approximately 85% of the surface area in the Appling Field. This evidence was irrelevant to the issues submitted to the jury. Petitioners' excluded evidence would have shown that ownership of surface acreage had a minimal relationship to actual production of gas.

At the second trial, the court held that the prior verdict constituted a finding of monopolization of the relevant market of the extraction of liquids from natural gas, a market not even submitted to the prior jury. The court then read the entire verdict to the second jury and permitted counsel for Respondents to use it throughout the trial and in final argument. This permitted Respondents to parlay a jury finding of monopolization of the drilling, production and transportation of gas in the Appling Field, which was based on a record devoid of evidence of market power in those relevant markets, into a judgment in excess of one million dollars for monopolization of an entirely different relevant market, the extraction of liquids, even though the

jury did not hold at either trial that Petitioners monopolized extraction.

Finally, the court erred in submitting Instruction 32 to the jury. Instruction 32 was in direct conflict with the law of the case, related to no issue submitted to the jury and was plainly impermissible under the decisions of this Court.

This Court should grant review and order a new trial to prevent a gross miscarriage of justice and a flagrant abuse of the private antitrust treble damage action and to correct errors of the courts below that clearly conflict with holdings of this Court. The Court should reject Respondents' argument that because this case has a long history, the Court should now bring it to an end by refusing certiorari. Even though there have been two trials and two appeals, justice has not been done. Errors that occurred at the first trial were compounded at the second trial, which was conducted by a different judge who was unfamiliar with the case. This Court should exercise its discretion to correct these errors that have greviously harmed Petitioners. Petitioners ask only that they be granted a trial before a jury that hears all the relevant evidence on all the issues and that is not prejudiced against Petitioners at the outset of the trial.

ARGUMENT

I.

The Verdict of the First Jury Should Not Have Been Read to the Second Jury and Counsel for Respondents Should Not Have Been Permitted to Refer Repeatedly Throughout the Trial and in Final Argument to the Prior Verdict.

The weakness of Respondents' position on the jury verdict issue is shown by their meritless arguments that

Petitioners "invited" the court to read the verdict and "waived" their objections to Respondents' counsels' inflammatory use of the prior verdict. These arguments were made by Respondents to the Fifth Circuit and were ignored by that court. (App. 121). Respondents employ these makeshift arguments because they have never been able to cite any authority for the court's unprecedented use of the prior verdict.

Respondents' contention that Petitioners invited error is simply untrue. Throughout the proceedings in the district court, Petitioners objected to any mention of the prior jury verdict in the presence of the jury and to permitting Respondents' counsel to argue from that verdict to the jury. When the trial court first drafted its charge, Petitioners objected to any mention of the prior verdict and objected further to the court's summary of the verdict, which contained omissions and misleading statements. It was then that the court, not Petitioners, decided to again read the entire verdict to the jury. (Court of Appeals Record, 73-1633, p. 3951). Petitioners preserved their objections to that procedure. (Court of Appeals Record, 73-1633, p. 3948-51, 4217).

Respondents next contend that admission of the jury verdict was proper because the court gave cautionary instructions which the jury presumably followed. Even the trial court recognized the fallacy of this argument. It expressly stated that if it erred in reading the verdict, such error would be "irretrievable" because the "inflammatory" nature of the matters contained in the verdict would constitute such "irreparable damage that you couldn't correct it." (Court of Appeals Appendix, 73-1633, pp. 196-99).

Respondents' contention that Petitioners waived their objection to reference by Respondents' counsel in final argument to the prior jury verdict is incredible. Petitioners

clearly preserved on the record during the pre-trial conference and throughout the trial their objections to the jury being told anything about the prior verdict by either the court or counsel. (Court of Appeals Appendix, 73-1633, pp. 195-96; Court of Appeals Record, 73-1633, pp. 275-77, 280-84, 315-16, 377-82). The court clearly recognized that Petitioners were taking this position and indicated to them that they did not need to expand the record by continuing such objections. (Court of Appeals Record, 73-1633, pp. 384-85). It was thus quite clear before the start of the jury argument that Petitioners objected to counsel's making any use of the verdict in the argument and indeed Petitioners forewarned the court as to the type of inflammatory argument Respondents' counsel would make from the jury verdict. (Court of Appeals Appendix, 73-1633, p. 42; Court of Appeals Record, 73-1633, pp. 382-83, 389-96, 398-400, 512, 3948-87). At the close of jury argument and prior to the court's giving its charge, Petitioners moved for a mistrial based on the inflammatory nature of the arguments presented to the jury by counsel for Respondents. (Court of Appeals Record, 73-1633, pp. 4147-48). It is thus clear that Petitioners have not waived their right to complain of Respondents' utilizing the verdict in the final arguments to the jury. *See Keen* v. *Overseas Tank Ship Corp.*, 194 F.2d 515, 519 (2d Cir.), *cert. denied*, 343 U.S. 966 (1952).

The Fifth Circuit held that it was "not error to instruct the jury as to the verdict reached by the first jury in the original trial of the case on the monopolization issue." (App. 121). Although it may have been permissible for the court simply to tell the jury that the monopolization issue had been determined at a prior trial, and that they were only to be concerned with and decide the issues submitted to them, the court did far more.

First, it read the entire verdict that included not only the monopolization issue and the jury's answer, but also

issues and answers on whether Petitioners refused to deal with Respondents' pipeline company and whether Petitioners "harrassed" Respondents in their efforts to build a pipeline. None of these issues had anything to do with any issue in the second trial. Nor was this action necessary to give the jury a "background" on the monopoly issue. Of course, prior judgments obtained by the United States are admissible under certain circumstances in subsequent private antitrust actions, 15 U.S.C. § 16(a). However, there is no statute or case law permitting similar use of prior judgments in cases between private parties. Even in cases involving Government judgments, it has been held that a prior verdict is not admissible to inform the jury of the "background" of the case. *International Shoe Machinery Corp.* v. *United Shoe Machinery Corp.*, 315 F.2d 449 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963).

Secondly, the court even failed to restrict the use of the prior verdict to "background." It permitted Respondents to put on the identical live testimony utilized at the previous trial to prove the conspiracy and monopoly and thereafter provided the jury with the verdict to show how the previous jury answered the issues concerning this testimony. (Court of Appeals Record, 73-1633, pp. 664-75, 1377-80, 1448). Obviously, this action boosted these witnesses' credibility on the issues to be decided in the second trial and conveyed to the jury the message that one jury had already found violations of the antitrust laws after hearing these very same witnesses testify.

Finally, even though the court recognized that the verdict was irrevelant to any issue in the second trial, it allowed counsel for Respondents to use the verdict throughout the trial and to argue that the prior verdict showed how the issues in the second case should be decided. (Court of

Appeals Record, 73-1633, pp. 4029-30, 4045-46, 4131-32, 4139).

Several examples will confirm the inflammatory and prejudicial use of the verdict in final argument. Counsel Mandell told the jury that "this monopoly that was established effectively prevented the deal between Lumar and Southeastern." (Court of Appeals Record, 73-1633, p. 4027). He repeated the message by asking the jury what "frustrated, killed, destroyed" the deal and his answer was "[t]he existing established, legally-established monopoly of Alcoa, Crown and Mr. Appling, there is no more than that." (Court of Appeals Record, 73-1633, p. 4035). Finally, he told them that the previous jury had "foreclosed the question that Mr. Appling, Crown Central and Alcoa had prevented Wolcott from signing the agreement" and then asserted that such determination also told them that the same people had prevented the construction of an extraction plant. (Court of Appeals Record, 73-1633, pp. 4045-46). Mr. Able told the jury that because of the prior verdict there was nothing left for it to decide in this case except the amount of damages that Respondents should be awarded. He said:

> Now, he was not permitted to go forward with that plant because of the activities which the previous jury has found.
>
> . . . The matter of whether they had the agreement between the other parties has been decided, and the fact that I have five minutes to talk to you is an illustration of why we do not have time to retry those matters over and to go into them, ...

(Court of Appeals Record, 73-1633, pp. 4139-40). These inflammatory arguments were followed by the court's once again reading to the jury the prior verdict. This gave the

clear impression that the court was endorsing Respondents' argument that the second jury should follow the lead of the first jury.

Counsel for Petitioners warned the court that counsel for Respondents would use the jury verdict in final argument to show the jury "what the former jury has already done to them so you go ahead and finish the job that this former jury started, that gets to the very most aggravated form of its inflammatory nature." The court said that such use of the prior verdict "might be reversible." (Court of Appeals Record, 73-1633, pp. 3812-13). However, as shown by the above passages from final argument, counsel for Respondents used the prior verdict in the very way that counsel for Petitioners predicted and the court permitted it. The effect was devastating and is grounds for review.

In view of the numerous and effective uses made of the verdict by the court and Respondents' counsel, the Fifth Circuit's statement that the court merely "instruct[ed] the jury as to the verdict reached by the first jury" has little relation to what actually happened. Moreover, the cases cited by Respondents to support the court's action on the prior verdict are not in point. These cases either involve (1) a case tried to the court or decided on directed verdict so that the problem of jury prejudice never arose, *Beetler* v. *Sales Affiliates, Inc.*, 431 F.2d 651 (7th Cir. 1970); *Gottesmann* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971) (*Gottesmann* also involved a Government judgment made admissible by statute, 15 U.S.C. § 16(a)); (2) a stipulation by the parties that the prior jury findings be read into evidence, *United States* v. *Bucon Construction Co.*, 430 F.2d 420 (5th Cir. 1970); (3) the use of a prior criminal conviction of a defendant at his subsequent criminal prosecution for the same offense to

show motive, *Cirillo* v. *Commissioner*, 314 F.2d 478 (3d Cir. 1963); or (4) the use of a prior judgment to estop one of the parties from relitigating an issue already determined in a prior case, *Stagecrafters Club, Inc.* v. *District of Columbia Division of American Legion*, 111 F. Supp. 127, 128-29 (D.D.C. 1953). None of these grounds is applicable in the instant case. This case was tried to a jury and there was no stipulation that the prior jury findings be admitted. The prior verdict was not admitted to estop Petitioners from retrying any issue, since they made no such attempt. The court said it was admitting the verdict for "background," not as an estoppel.

The *Gottesmann* court recognized the very problem presented in the instant case. It said that courts should be more inclined to give evidentiary weight to a prior judgment when the "case is being tried to a judge rather than to a jury, thus minimizing the nagging problem of undue prejudice referred to in many of the cases." 414 F.2d at 963-64. The instant case is a classic one involving undue prejudice. Other decisions have recognized that introduction of a prior judgment "merely for its aura of guilt" or to "imply new wrongdoing from past wrongdoing" is erroneous, particularly when the prior judgment has a "potentially high emotive impact on a jury of laymen." *Buckhead Theater Co.* v. *Atlanta Enterprises, Inc.*, 327 F.2d 365, 368 (5th Cir.), *cert. denied*, 379 U.S. 888 (1964); *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629, 632 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952). That was precisely the result here and yet the district court's action ignored all these caveats.

Neither Respondents nor the courts below have cited a single case to support the extensive use of the prior verdict by the court and counsel for Respondents. Petitioners sub-

mit that no such case exists. Rather, the cases show that the "emotive impact" and the potential for "undue prejudice" involved when a prior judgment or verdict is disclosed to a second jury is so great that the verdict should not have been admitted for any reason, much less for unlimited use by court and counsel. *E.g., Gottesmann* and *Buckhead Theater, supra.* Petitioners submit, therefore, that this Court should hold that it was error to try this case in such an atmosphere.

II.

The Entry of Two Separate Judgments Upon a Single Cause of Action Is Inadmissible Under the Federal Rules.

This issue was fully developed in the Petition for Writ of Certiorari and thus Petitioners will not argue this point further.

III.

The District Court Should Have Submitted an Antitrust Liability Issue to the Second Jury.

The decisions of the courts below establish the dangerous precedent of permitting a finding of monopolization in one relevant market to be used as the basis for an enormous antitrust award in a case involving a wholly separate relevant market. Their decisions are in direct conflict with decisions of this Court which hold that before an issue can be deemed previously adjudicated, it must be clear that the question was "distinctly put in issue and directly determined . . . ." *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569 (1951). The question of monopolization of the extraction of liquids from natural gas in the Appling Field was clearly not "distinctly put in issue and directly determined" by the first jury.

The first trial involved the charge by Respondents that violations of Sections 1 and 2 of the Sherman Act by Petitioners had frustrated Respondents' plans to build a pipeline in the Appling Field. At this point, it has been held that Petitioners blocked the pipeline by monopolizing the "drilling for, producing, and transporting gas from the Appling Field." (App. 70, 71). The second trial involved similar charges related to a plant designed to extract liquids from natural gas, a process related to but completely different from drilling, production and transportation. It clearly does not follow that because a company monopolizes the drilling, production and transportation of gas it necessarily monopolizes the extraction of liquids from the gas. Nevertheless, the courts below concluded that the first verdict also decided the issue of monopolization of extraction. This is in direct conflict with the teaching of *Emich, supra.*

The conflict with *Emich* occurs because the court at the first trial excluded all evidence on the extraction plant. (Court of Appeals Appendix, 73-1633, pp. 177, 186). It is thus difficult to comprehend how a jury that did not hear one shred of evidence on the extraction issue could have found by implication, or otherwise, that Petitioners monopolized the extraction of liquids in the Appling Field. Thus Respondents' contention that the first jury's finding that Petitioners monopolized the "transportation" of gas was equivalent to a finding that they monopolized extraction of liquids is not plausible.

It is hornbook law that for an antitrust plaintiff to prevail he must prove three things: (1) a violation of the antitrust laws; (2) injury to his business or property as a result of the antitrust violation; and (3) ascertainable damages. At the second trial, Respondents were only required to prove (2) and (3). This denied Petitioners

their day in court on the antitrust liability issue. This denial resulted from the district court holding that the prior jury had found monopolization of extraction of liquids even though that issue was not "distinctly put in issue and directly determined . . . ." *Emich, supra.* This Court should order a full trial on all the antitrust issues.

IV.

The Trial Courts Should Not Have Excluded All Evidence of Production of Gas from the Appling Field.

Monopolization under Section 2 of the Sherman Act requires proof that establishes the present existence of such market domination that the monopolist has "the power to control prices or exclude competition." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). In *Grinnell*, this Court went on to say: "The existence of [monopoly power] ordinarily may be inferred from the predominant share of the market." *Id.*

At the first trial, Respondents' assertions under Section 2 of the Sherman Act concerned a gas field located on the Texas Gulf Coast called the Appling Field. They asserted that Petitioners had monopolized, attempted to monopolize or conspired with others to monopolize the production and transportation of gas from the Appling Field. Yet they offered not one line of evidence as to the amount of Petitioners' production of gas from the field or as to the total amount of gas produced from the field. They merely proved that Petitioners had leased approximately 85% of the surface acreage in the Appling Field, (Court of Appeals Record, 72-2792, pp. 2655-56), and then argued that this power directly translated into power over 85% of the production in the field. Petitioners offered evidence to show that their ownership of the surface

acreage did not equal a "predominant share" *Grinnell, supra*, of the gas production and that under no theory did Petitioners control a predominant share of gas production in the field. This evidence related to Petitioners' actual share of the gas production in the Appling Field. However, this evidence was erroneously excluded by the court.

Petitioners' evidence on their actual share of gas production in the Appling Field would have destroyed Respondents' monopoly case by acquainting the jury with the economic realities that existed in the field. The economic reality was that while Petitioners owned 85% of the surface acreage of the Appling Field and Respondents less than 1%, the amount of gas they produced was governed by the $^1/_3$-$^2/_3$ rule.* The first effect of the $^1/_3$-$^2/_3$ rule was that Respondents were not confined to producing only the gas that lay under their acreage. Rather, Rspondents were permitted to produce gas from under Petitioners' lands. Thus the $^1/_3$-$^2/_3$ allocation formula in itself gave Respondents' wells a tremendous production advantage over Petitioners' gas units. The advantage was compounded by the fact that the operation of the $^1/_3$-$^2/_3$ allocation formula rendered Petitioners' wells incapable of producing

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* Under the rule, $^1/_3$ of total field production is allocated equally among all wells in the reservoir and $^2/_3$ of the total field production is allocated to each well on the basis of the ratio which the surface acreage upon which each well is drilled bears to the total surface acreage of the field. A more detailed description of the operation of the $^1/_3$-$^2/_3$ proration formula utilized by the Texas Railroad Commission for allocation of production to all wells in the Appling Field is set forth in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 284 F. Supp. 582 (S.D. Tex. 1968). *See also, Railroad Comm'n.* v. *Woods Exploration & Producing Co.*, 405 S.W.2d 313 (Tex. 1966); *Railroad Comm'n.* v. *Aluminum Company of America*, 380 S.W.2d 599 (Tex. 1964); *Railroad Comm'n.* v. *Shell Oil Co.*, 380 S.W.2d 556 (Tex. 1964); *Atlantic Refining Co.* v. *Railroad Comm'n.*, 346 S.W.2d 801 (Tex. 1961).

even the allowables assigned to them. Petitioners' wells were thus classified as limited capacity wells and the excess production was allocated to Respondents' and other small tract owners' wells. Thus Respondents produced that gas in addition to the original allocation given to them by the ⅓-⅔ rule. That enabled Respondents to produce far more of the reserve allowable than their share as determined by the basic operation of the ⅓-⅔ rule would have given to them. *See Railroad Comm'n* v. *Woods Exploration & Producing Co.*, 405 S.W.2d 313 (Tex. 1966); *Railroad Comm'n* v. *Aluminum Company of America*, 380 S.W.2d 599 (Tex. 1964).

Accordingly, because of the operation of the ⅓-⅔ rule, Petitioners produced only 50% of the gas in the Appling Field while Respondents and the other small tract owners produced the other 50%. Petitioners argued to the trial court that most of these facts were undisputed and that they were of critical importance to the issue of whether Petitioners had monopolized the production of gas in the Appling Field. Respondents argued below and repeat the argument here that the evidence should not have been admitted because they were entitled to produce the gas that they did produce under the ⅓-⅔ rule. Respondents' argument is based on the fact that lawsuits were filed by Petitioners which asserted that the application of the ⅓-⅔ rule, which previously had been declared unconstitutionally confiscatory by the Texas Supreme Court, should be abolished in the Appling Field and that Respondents should not be permitted to produce under the rule. Petitioners ultimately lost both of those decisions in the Texas Supreme Court. Consequently, in the antitrust cases the legality of the production was assumed; and the evidence was offered simply to show that Petitioners lacked monopoly power, since power over acreage did not equal power over pro-

duction and that Petitioners' 50% share of the gas produced in the Appling Field was far too low to support a verdict on monopolization. When this evidence was excluded, it meant that the only evidence before the jury on the issue of monopolization was the percentage of the surface acreage of the Appling Field leased by Petitioners. The jury thus based its finding of monopolization, which was affirmed on appeal, on the simple proposition that 85% ownership of the acreage translated into 85% production of gas from the Appling Field.

This resulted in the incredible finding that Petitioners monopolized production in the Appling Field, a market that was intricately regulated by the Texas Railroad Commission to ensure that each producer in the field obtained his fair share of gas, though it had no evidence before it on gas production in the Appling Field. It is Petitioners' position here that had the jury known the true facts as they existed in the Appling Field they never would have found that Petitioners had monopolized gas production in the Appling Field.

This conclusion follows because the Fifth Circuit and all other courts have consistently held that a market share of 50% is not "predominant," *Grinnell, supra,* and thus cannot support a monopolization verdict. In *Cliff Food Stores, Inc.* v. *Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969), the court said, "It appears that something more than 50% of the market is a prerequisite to a finding of monopoly." The court went on to say that Section 2 "has never been found to cover a monopoly in an industry in which the leading firm accounts for less than 70% of the market." *Id.* at 207 n.2.

In *Jack Winter, Inc.* v. *Koratron Co.*, 375 F. Supp. 1 (N.D. Cal. 1974), the court said:

> Even if the Court accepted this evidence as defining a relevant submarket, the only evidence offered which bears on the question of Koratron's percentage share supports an inference that it was at most 42%. This figure does not approach the percentage shares which have been held to be monopoly shares. See United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87%); International Boxing Club v. United States, 358 U.S. 242, 249 (1959) (81%); American Tobacco Company v. United States, 328 U.S. 781, 797 (1945) (over 67%, over 80%); United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (90%).

375 F. Supp. at 68. In *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), the court cited nine cases in which monopolies have been held to exist. The monopolist's share of the relevant market in each ranges from 70% to 100%. 402 F.2d at 974 n.6.

These cases show that the difference in Petitioners' 85% share of the surface area of the Appling Field and their 50% share of the production of natural gas from the field is critical. If Petitioners had actually produced 85% of the gas in the Appling Field, that figure could support a monopoly verdict while a 50% share clearly would not. The court's exclusion of all evidence of Petitioners' share of production permitted the jury to find that Petitioners monopolized a relevant market on which no evidence had been submitted. This verdict was then used at the second trial as proof of monopolization of an entirely separate and distinct relevant market, *i.e.*, the extraction of liquids from natural gas, which was not put in issue or submitted to the jury at all in the first trial and, indeed, was expressly excluded from consideration by the jury at the first trial. A judgment in excess of one million dollars resulted at the second trial.

The courts' action in excluding all evidence of gas production in the Appling Field directly conflicts with the recent holding of this Court that statistical evidence of market shares is not the only relevant evidence in a monopoly case. *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974). There the Government challenged General Dynamics' acquisition of a coal company. To prove its case, the Government put on statistical evidence that showed a substantial trend towards concentration in the coal industry and that the acquisition had increased the merged companies' share of the relevant market of coal production. These statistics were limited to past production of coal. The defendants put on evidence to show that past production was not the proper criterion for assessing competition in the coal market. Defendants showed that although the acquired coal company's past production was high, its coal reserves were not large and those that it did have were almost entirely committed to long term contracts. Defendants also urged that an examination of the economics of the industry would show that the market structure had changed. Defendants urged that these factors made the acquired coal company far less of a competitive force than suggested by the Government's figures on past production.

This Court held for the defendants. It cited *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), thus making clear that *General Dynamics* was not a departure from existing precedent, for the proposition that in determining the legality of a merger, courts should not look only at statistics but at the "structure, history and probable future" of a market. 415 U.S. at 498. The Court concluded that in view of the limited reserves of the coal company, the long term contracts to which virtually all its coal was committed and other factors, an analysis of the market reali-

ties showed the acquisition would not substantially lessen competition.

General Dynamics highlights the error in the instant case. Here Respondents put on statistical evidence to show that Petitioners leased approximately 85% of the acreage in the Appling Field and argued that this showed a monopoly; however, in contrast with *General Dynamics*, Petitioners were then denied the right to show that because of the "structure, history and probable future" of the market this statistic was irrelevant to the issue to be submitted to the jury — whether Petitioners monopolized the production of gas. If Petitioners had been allowed to put on production evidence, it would have shown that 85% control of surface acreage did not translate into 85% of the production of gas. Petitioners produced only 50% of the gas from the field. Furthermore, Petitioners' evidence on the operation of the ⅓-⅔ rule would have shown not only that percentage of surface acreage did not equal percentage of gas production, but also that production of gas from the field was closely regulated by the Railroad Commission to ensure that all producers obtained their fair share of the gas. Such regulation could have persuaded the jury that it was impossible for a party to monopolize the gas field. Finally, as in *General Dynamics*, the evidence would have shown that Petitioners' gas reserves were not overwhelming because of their rapid depletion by the operation of the ⅓-⅔ rule.

Petitioners clearly should have been permitted to introduce evidence on the production of gas from the Appling Field, since this was the very market they were charged with monopolizing. Moreover, under *General Dynamics*, Petitioners should have been permitted to put on evidence

on the ⅓-⅔ rule to show that in view of the "structure, history and probable future" of the market, Petitioners were not monopolists. If the *General Dynamics* case had been treated as the instant one, the Government would have been permitted to put on its statistical evidence of market concentration and that would have been the end of the case. Defendants would not have been permitted to respond. Clearly, if *General Dynamics* had been handled as the instant case, the result would have been the opposite. The only evidence before the court would have been the Government's statistical evidence of increasing market concentration and the increase in the market share of the merged companies. The evidence on coal reserves and long term contracts, which reflected the market realities, would have been excluded just as all evidence of production and the operation of the ⅓-⅔ rule was excluded in the instant case. Thus a judgment would have been entered that did not relate to the commercial reality of the situation. Clearly, *General Dynamics* holds that this should not occur.

The impact of the excluded evidence, which was highly relevant evidence with probative value, had the requisite harm to Petitioners to warrant a new trial. The decisions clearly teach that a new trial must be ordered whenever the trial court improperly excludes evidence or a defense which is germane to a material issue in the case. As stated in *Kennelley* v. *Travelers Ins. Co.*, 273 F.2d 479, 481 (5th Cir. 1960), the "substantial rights of the party are generally held to be affected where the excluded evidence relates to a material point." Certainly, in this case the excluded evidence was so persuasive that it might have led to a different result. *See Thermo King Corp.* v. *White's Trucking Service, Inc.*, 292 F.2d 668 (5th Cir. 1961).

V.

The Second Trial Court's Instruction 32 Was Wholly Without Basis in Law or the Evidence Presented.

Instruction 32 was wholly unwarranted under *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and makes a mockery of this Court's consistent jealous protection of the right to seek redress in the courts of the land. *Id.*; *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). This Court should grant review to correct this misinterpretation of and extreme extention of *Trucking*.

Under the *Noerr-Pennington* doctrine, Petitioners had every right to attack before the Texas Railroad Commission and in the courts the Railroad Commission regulations that were permitting Respondents to drain millions of dollars worth of gas from under Petitioners' property. Such actions would only be illegal if they amounted to "shams." *Trucking* and *Noerr*, *supra*. There was no evidence that the lawsuits in the instant case were shams or were used to "harrass and deter [Respondents] in their use of administrative and judicial proceedings so as to deny them 'free and unlimited access' to these tribunals." The courts were not "effectively closed" to Respondents and Petitioners were certainly not made the "regulators of the administrative process." *Trucking* at 511. Respondents had unlimited access to the courts and administrative bodies of the State of Texas and were eventually successful in convincing them to let Respondents operate under rules that permitted them to drain Petitioners' gas. This case thus does not fall under *Trucking*.

Petitioners met to decide what to do about Respondents and other town lot operators who were draining Petition-

ers' gas. These meetings are admitted. They took place because Petitioners had concluded that the operations of the small lot operators, such as Respondents, would cost them 31.6 million dollars in gas over the life of the Appling Field. (Defendants' Trial Exhibit 30). Petitioners thus decided to take whatever legal and administrative action was necessary to prevent such drainage by attacking multiple completions, which they did not believe were contemplated by the applicable Railroad Commission rules, and by challenging administratively and later judicially what they believed to be the unconstitutional operation of the $\frac{1}{3}$-$\frac{2}{3}$ proration formula in the Appling Field. That these actions, if successful, would have curtailed or reduced the town lot operators' gas production provides no justification for Instruction 32. Obviously, a situation in which businessmen meet and decide to take legal action to preserve their own property rights through legal and administrative action does not begin to fall within the prohibition of *Trucking*.

In *Trucking*, a group of truckers set up an organization to oppose all attempts by other truckers to obtain certificates of public convenience and necessity and to oppose all other beneficial rulings that competitors might seek from either the Interstate Commerce Commission or its California equivalent. The group specifically announced to all competitors that they would fight them to the bitter end in the courts and before the state agencies on any application that needed administrative approval and that they would oppose such applications whether they had probable cause to do so or not. That action effectively closed the agencies to all other parties and turned over all legal control to the group of truckers. This is far from the situation in the instant case.

It is clear under *Trucking* that the good faith lawsuits brought by Petitioners who had probable cause to believe

that they would prevail were not illegal. In the first place, Judge Singleton found that the lawsuits were brought in good faith and based on probable cause. *Woods Exploration & Producing Co.* v. *Aluminum Company of America,* 284 F. Supp. 582, 594-95 (S.D. Tex. 1968). This holding was never appealed and thus became the law of the case. At the second trial, Justice Clark even stated that there was no dispute over whether the suits were filed in good faith. (Court of Appeals Record, 73-1633, pp. 206-212, 2371). Petitioners were thus amazed when he decided to give Instruction 32.

An examination of the litigation instituted by Petitioners confirms that Justice Clark should have adhered to his original reasoning and not given Instruction 32. The challenge to multiple completions was filed because Petitioners believed that the Texas Railroad Commission did not contemplate multiple completions in the separate reservoirs of the Appling Field. Numerous lawsuits had to be filed because the Railroad Commission's regulations necessitated a lawsuit each time a permit to drill a well in the Appling Field was sought or the right to challenge the permit would be waived. A test case was instituted, lost in the trial court, won in the Court of Civil Appeals and finally lost in the Texas Supreme Court. *Benz-Stoddard* v. *Aluminum Company of America,* 368 S.W.2d 94 (Tex. 1963). When this test case was lost, all the other multiple completion cases, which had been permitted to lie dormant, were dismissed. (Court of Appeals Record, 73-1633, pp. 3085-86).

Petitioners have already acquainted the Court with the operation of the ⅓-⅔ proration formula in the Appling Field. In March 1960, they challenged the validity of that proration order before the Railroad Commission because

they believed that the operation of the formula in the Appling Field was confiscatory and denied them their right to produce their fair share of the gas, in that it was permitting the uncompensated drainage of their gas by town lot operators, such as Respondents, who owned a minute amount of acreage. (Court of Appeals Record, 73-1633, pp. 3091-98, 3108-17). Petitioners' witnesses testified that after they saw engineering studies showing that they stood to lose 31.6 million dollars over the life of the field from this uncompensated drainage, they decided that substantial legal expenditures were justified for taking whatever steps were necessary in the courts and before the Railroad Commission to protect their gas in the Appling Field and to secure their fair share of production in that field. (Court of Appeals Record, 73-1633, pp. 2348-86, 2394-95, 2426-27, 2434-40, 2474-83, 2512-19, 2528-32, 2550-59, 3153-63, 3366-67, 3372-81, 3392-93). When the Commission refused to rescind the order, Petitioners filed a suit in the spring of 1961 challenging the proration formula. Petitioners were successful in the trial court and in the Court of Civil Appeals. While the Texas Supreme Court agreed that the formula was confiscatory and invalid, it held against Petitioners solely on a finding of laches. *Railroad Comm'n* v. *Aluminum Company of America,* 380 S.W.2d 599 (Tex. 1964).

At trial, Respondents put on no evidence that the legal actions discussed above were brought in bad faith and, as discussed below, argued throughout the trial that these lawsuits were irrelevant to the issues being tried. Instruction 32 thus permitted the jury to find that good faith lawsuits brought on the basis of sound business judgments were "shams." This instruction was entirely unwarranted under *Trucking; Pennington;* and *Noerr, supra,* which

have carefully carved out a narrow category of lawsuits that generate antitrust liability. Instruction 32 expands this category immensely.

Instruction 32 not only erroneously stated the law, but also there was no issue to which it related, since the trial court had excluded antitrust violation issues from the case. Therefore, under the questions propounded to the jury, this instruction, if it related to any issue, could only relate to the causation issue. The instruction was given at Respondents' request and one would surmise that they were contending that the lawsuits were "constituent elements of an unlawful scheme," that caused the extraction plant not to be built.

In fact, however, this was never Respondents' position. Respondents asserted and attempted to show that it was Mr. Appling's invocation of the clause in his right-of-way agreement with Lumar that caused no plant to be built. It was *Petitioners* that contended that if there ever was a deal for an extraction plant, it had not gone through because at the time negotiations were taking place the validity of the ⅓-⅔ proration formula was being litigated before the Texas Railroad Commission and the validity of multiple completions in the Appling Field was being litigated in the courts of Texas.

Petitioners urged that these viable legal challenges to Respondents' gas supply rendered the extraction plant wholly unfeasible so that neither Respondents nor Lumar would have gone ahead with it and, that even if they had wanted to, no banker would have loaned them the money. Respondents' counsel and witnesses vehemently denied these propositions and objected throughout the trial that any reference to these legal actions was irrelevant and

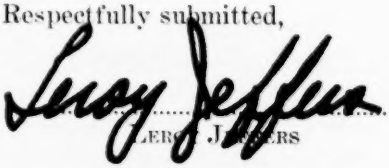
immaterial. (Court of Appeals Record, 73-1633, pp. 570-71, 804, 827-28, 996-97, 1131-32, 1251, 1348, 1444-46, 4026, 4037, 4045, 4135). In that posture there was no contention made and clearly no evidence advanced by Respondents to support Instruction 32. The instruction was thus especially harmful and unwarranted in that it told the jury, ironically, that even if they accepted Petitioners' theory of the case they could still hold for Respondents by finding that the lawsuits were "illegal." This was all despite the fact that Respondents never contended that the lawsuits caused the plant not to be built.

This Court should grant review on the issue of Instruction 32 to correct the trial court's gross extension of and misinterpretation of *Trucking*. In *Trucking*, this Court made it clear that it was extremely protective of the right to bring lawsuits, and it was simply applying the "sham" exception recognized in *Noerr*. In the instant case, the lawsuits brought by Petitioners were not shams. First, the trial court itself stated early in this case that the suits were brought in good faith. Secondly, the prior trial court held that they were brought in good faith with probable cause. Thirdly, the evidence showed that they were brought to prevent confiscation of 31.6 million dollars worth of Petitioners' gas. Finally, these lawsuits were won in three out of the six courts that considered them. In the ⅓-⅔ lawsuit, the Texas Supreme Court agreed with Petitioners' position and denied relief only because of laches. It is thus clear that these lawsuits were not shams.

CONCLUSION

For the reasons stated in this brief and in Petitioners' Petition for Writ of Certiorari, the Petition should be granted, the judgment of the Court of Appeals reversed, and the entire case remanded to the trial court for a single trial on the entire action.

Respectfully submitted,



First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

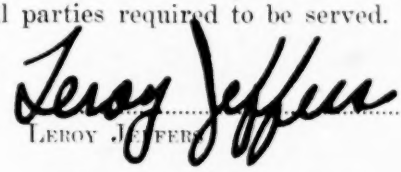
Of Counsel:

ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Reply Brief of Petitioners were served upon Mr. Levert J. Able, 1201 First National Life Building, Houston, Texas 77002 and Mr. Herman V. Wright, Mandell & Wright, 1901 First National Life Building, Houston, Texas 77002, Counsel for Respondents, by placing the same in the United States mail, first class postage prepaid this 12 day of July, 1975, thus serving all parties required to be served.



LEROY JEFFERS

First City National Bank
Building
Houston, Texas 77002

Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL, *Respondents*

SUPPLEMENTAL BRIEF OF RESPONDENTS, ANSWERING PETITIONERS' REPLY BRIEF OF JULY 16, 1975

LEVERT J. ABLE
1201 First National Life Building
Houston, Texas 77002
(713) 224-6033

HERMAN WRIGHT
MANDELL & WRIGHT
1901 First National Life Building
Houston, Texas 77002
(713) 228-1521

TOM F. COLEMAN, JR.
1201 First National Life Building
Houston, Texas 77002
(713) 224-6033

Attorneys for Respondents, Woods Exploration & Producing Company, Inc., Stanley C. Woods, and Southeastern Pipeline Company

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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PRELIMINARY STATEMENT

The slip opinion of the Court of Appeals, March 13, 1975, sought to be reviewed, is now reported as *Woods Exploration & Producing Company, Inc., v. Aluminum Company of America,* 509 F.2d 784 (1975).

The Reply Brief of Alcoa et al's, filed on or about July 16, 1975, contains so many misstatements and distorted statements that Respondents cannot begin to deny them all in the space alloted. The true facts are contained in Justice Clark's trial opinion and Circuit Court of Appeals opinions.

REPLY TO ARGUMENT

I.

Alcoa et al were responsible for the two trials and for the reading of the verdict to the second jury. The court, however, carefully protected Alcoa et al from any prejudice in instructions, and gave Alcoa et al a fair trial.

Woods et al contend that Alcoa et al did have a fair trial. Justice Tom Clark, in his opinion, stated:

> "Moreover, it is this court's judgment, independent of the law of the case as established by the Court of Appeals, that Defendants have not been denied a fair trial" (Page 102 of Petitioner's Appendix).

This answers and controls all of the little out-of-context references by Petitioners to the pre-trial record and record not before this Court.

It was Petitioners who requested the Court that, rather than submit only part of the first jury's verdict, it would be more logical to submit to the second jury the entire verdict. It was obvious that (1) because of the amount of evidence the trial judge allowed regarding Petitioners' claim of drainage of gas beneath Alcoa's and Crown's leases, and (2) because the last jury, through the submission of the prior jury's award of substantial damages

(See First Verdict attached to Petitioners' Original Petition for Certiorari, p. 5b) to Respondents, the prior jury's damage findings could cut both ways and that the jury in the instant case "could view it that the Plaintiff had already gotten enough and Defendants had been punished enough by this amount of money, so we won't give them any more." Petitioners' counsel concede this possibility (Court of Appeals Record 73-1633, pp. 488-489, Record 395).

II.

There is no substance or harm in the claimed error in the two separate judgments. They were combined for argument on the appeal. It was Alcoa that invited the Fifth Circuit in its first judgment to allow them the right to a partial final judgment to protect them from a suit in the state court. This was done. The trial and appeal would have been handled no differently if the trial court had let the verdict stand in the first trial, without a partial judgment thereon, and submitted the issues on the extraction plant in the second trial.

III.

The court properly refused to resubmit the issue of liability to the jury and limited the trial to the issue of damages due to interference with liquid extraction plant. The general manager of Alcoa admitted that the restriction on production and transportation directly affected the extraction of the by-products. Also see Circuit Court of Appeals in the Second Opinion, pp. 119, 120 and 121 of Petitioner's Appendix.

IV.

The trial court permitted evidence of the production in both trials.

Tanner, Crown's landman, said that Alcoa et al's agent Appling, owned everything around the townsite except the Carancahua Bay (Court of Appeals Record 73-1633, at page 883, Record 1224). This way, they were able to control the pipelines and stripping plants connected therewith in the Appling Field and barricade access to markets or make the same prohibitively expensive (Petitioners' Appendix, pages 114, 115 and 116).

Alcoa's executives admitted that the small-tract operators, including Woods et al, would not recover over thirty per cent of the reserves in the upper sands (Court of Appeals Record 73-1633, page 1768, Record 3339 and 3340), thus leaving Alcoa with 70 per cent of the production from the upper sands and 100 per cent of the unproduced reserves below the Mid-Kopnicky.

V.

The Instruction No. 32 was properly given and caused no harm to Alcoa et al.

Justice Clark in his opinion correctly summarized the evidence as follows:

> "(e) Defendants' objection as to Instruction No. 32 is not persuasive. There was testimony that Alcoa caused a shutdown of Woods' wells on a spurious complaint; and that each time the plaintiffs received a favorable ruling from the Commission or the granting of a permit, defendants filed a law suit to delay and prevent its implementation. Indeed there was

> testimony indicating that defendants gave standing instructions to file suits as soon as plaintiffs received favorable orders. The Instruction merely said that if these actions were part of defendants' monopolization activities, then they were illegal. That is the law." (Page 105 of Petitioners' Appendix).

To illustrate evidence in support of the trial judge's finding, the attorney for Alcoa et al threatened Woods that when they got through using the legal procedures that they knew were baseless, "you are going to be broke down there." The attorney said, "We'll end up breaking you." After Alcoa et al's attorney told Woods there was no basis for attack under the Railroad Commission rules, they still attacked the same (Court of Appeals Record 73-1633 pages 790 to 792, Record 1067 to 1070, and pages 1006 to 1011, Record 1435 to 1443). Joe Williams, another independent producer, said: "Every time I got a permit, I got a notice of a lawsuit. I got thirty-seven permits and thirty-seven lawsuits." (Court of Appeals Record 73-1633, page 982, Record 1393).

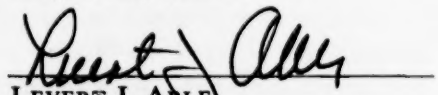
CONCLUSION

The question raised as to liability are all without merit. The amount of damages in the second trial was reduced by the jury by about fifty per cent due to an instruction on income taxes. The delay to date has benefited Alcoa because of (a) inflation and (b) inadequate rate of interest since the trial of only six per cent.

Numerous courts have tried to satisfy the Petitioners and to give them every opportunity to prove their innocence, which they have failed to do. Justice has been

done, and this Writ should be refused so that the Respondents during this lifetime may receive the money the jury and the courts have awarded them after thirteen (13) years of due process to Alcoa et al.

Respectfully submitted,



LEVERT J. ABLE
1201 First National Life Building
Houston, Texas 77002
(713) 224-6033

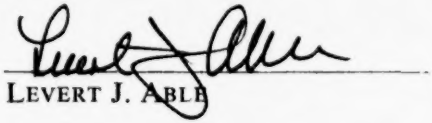
HERMAN WRIGHT
MANDELL & WRIGHT
1901 First National Life Building
Houston, Texas 77002
(713) 228-1521

TOM F. COLEMAN, JR.
1201 First National Life Building
Houston, Texas 77002
(713) 224-6033

Attorneys for Respondents, Woods Exploration & Producing Company, Inc., Stanley C. Woods, and Southeastern Pipeline Company

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was served on the 8th day of September, 1975, on attorneys for Petitioners, pursuant to Rule 33 (1) of this Court, by placing three (3) copies of the foregoing Brief in the U.S. Mail, first class, postage paid, addressed to counsel of record for Petitioners, at their post office address of record, thus serving all parties required to be served.



LEVERT J. ABLE

SUPREME COURT, U. S.

OCT 1 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

REPLY OF PETITIONERS TO RESPONDENTS' SUPPLEMENTAL BRIEF

LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners
Aluminum Company of America,
Crown Central Petroleum Corporation,
Lavaca Pipeline Company

Of Counsel:
ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

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REPLY OF PETITIONERS TO RESPONDENTS' SUPPLEMENTAL BRIEF

PRELIMINARY STATEMENT

Respondents' Supplemental Brief contains such blatant distortions of the record that it necessitates this reply. These distortions are an obvious attempt to create the impression that this Petition for Writ of Certiorari seeks nothing more than review of disputed fact questions. This is not the case. This Petition involves substantial legal questions that should be resolved by this Court. This reply shows that Respondents resorted to these record distortions because there was no other way to justify the results reached by the courts below.

ARGUMENT

I.

Petitioners Did Not "Request" the District Court to Read to the Jury the Prior Jury's Verdict.

Respondents' repeated contention that Petitioners "invited" or "requested" the trial court to read to the jury,

as part of its charge, the prior jury's verdict is incredible and untrue. During the lengthy pretrial conference, counsel for Petitioners argued for literally hours that the prior jury's verdict should not be read in whole or in part to the second jury.

Respondents' statement that counsel for Petitioners "conceded" that reading the prior verdict at the outset of the trial might be favorable to Petitioners, Supplemental Brief at 2-3, is equally unsupportable. A review of the record references cited by Respondents confirms that there was no such concession. Justice Clark suggested to Mr. Jeffers, counsel for Petitioners, that reading the prior verdict to the jury could have a favorable impact on Petitioners' case, because the jury might think Respondents had already been awarded sufficient damages. Mr. Jeffers responded as follows:

> Well, I think that is a rather remote likelihood.
>
> They could view it as the plaintiff has gotten enough already and the defendants have been punished enough already by this amount of money, so we won't give them anymore, but I think the more likely inflammatory result of this is that they are really bad people, that the other jury really laid it on them and they didn't even have this extraction plant before them, so they have set the example, they have set the pace, we'll keep up with them. We will follow suit. If they've already looked at this and found what bad people these people are and how they are to be punished so we won't depart from it.

(Court of Appeals Record, 73-1633 pp. 395-96). This statement is consistent with Petitioners' contention throughout the pretrial conference that reading the prior verdict to the jury would have a devastating effect on Petitioners' case and would deny them a fair trial.

At the conclusion of the evidence, counsel met in chambers with Justice Clark to formulate the jury charge. The charge prepared by the Court contained an incorrect and unfair summary of the prior jury verdict. Mr. Jeffers objected to the summary as being

> "immaterial and irrelevant to any issue in this case, and the [jury verdict] has no probative value or force to aid or assist the jury in any way in passing upon the issues to be determined by the jury in this case. On the contrary, it's completely incompetent and highly inflammatory and prejudicial, and it conveys to the jury the effect and the impression that the defendants are law violators, criminal conspirators; that a former jury had decided against them and that they should do likewise.
>
> . . . [The charge] does not constitute a full and fair statement of the jury finding in the former trial . . .

Then the following colloquy occurred:

THE COURT: Would you object if I gave the whole verdict to them?

MR. JEFFERS: We object to giving any of it, but our position is if the Court is going to comment on any of it at all, that it must be a fair and complete comment, but our basic position is —

THE COURT: I'll put it all in like I did the other way [day?].

MR. JEFFERS: That it's erroneous to give the jury anything about the former verdict.

THE COURT: I understand your position, but since you raise the point, the Court feels that the theory of the case requires the use of the findings, and so, the Court will quote all of the findings.

MR. JEFFERS: To which we will object and except, ..."

(Court of Appeals Record, 73-1633, pp. 3948-51)

Respondents also assert that the reading of the verdict was somehow favorable to Petitioners "because of the amount of evidence the trial judge allowed regarding Petitioners' claim of drainage of gas beneath Alcoa's and Crown's leases, ..." Supplemental Brief at 2. This allegation, whatever it means, is baseless. At the first trial, Judge Singleton excluded all evidence of drainage of gas from beneath Petitioners' land because he thought this evidence applied only to the issue of "false nominations," which he had already disposed of by summary judgment. Thus the jury verdict read to the second jury made no reference whatsoever to drainage. Surely Respondents' insistence on these baseless points confirms that it cannot otherwise justify the clear error of reading to the second jury the first jury's verdict.

II.

The Liability Issue Should Not Have Been Excluded From the Second Trial.

Under III of the Supplemental Brief, Respondents appear to say that the trial court properly refused to submit the issue of antitrust liability to the second jury because: "The general manager of Alcoa admitted that the restriction on production and transportation directly affected the extraction of the by-products." No record reference is given. Since the extraction plant issue was excluded from the first trial the quoted testimony was presumably given at the second trial. Respondents are thus contending that Justice Clark's decision at the outset of the second trial to exclude the liability issue was based

on testimony given two weeks later, near the end of the trial. This suggested rationale for the exclusion of the liability issue is thus clearly specious.

Moreover, even if it is assumed that the monopoly that the first jury found Petitioners had over transportation and production of natural gas "affected" the extraction of liquid by-products, it does not follow that a liability issue as to these liquid by-products should have been excluded from the second trial. Petitioners have demonstrated that the distinct relevant market of the extraction of liquids was not involved in the first trial. It is well settled that the offense of monopolization requires a finding of monopoly power in a relevant market. At the first trial there was no evidence of or jury finding on Petitioners' power over the relevant market of extraction of natural gas by-products in the Appling Field. Thus no logical basis exists for the court's holding that the prior jury verdict on monopolization of production and transportation equaled monopolization of extraction. *Overseas Motors Inc.* v. *Import Motors Ltd.*, 1975 Trade Cases ¶ 75,242 (E.D. Mich. 1975).

III.

At the First Trial All Evidence of Production of Natural Gas in the Appling Field Was Excluded.

Petitioners stand convicted of monopolizing the production and transportation of natural gas from the Appling Field even though the jury that convicted them never heard one scintilla of evidence on the relevant market shares of the competitors in the Appling Field based on the actual production of gas from the Field. Petitioners have argued in this Court and the courts below that the exclusion at the first trial of all evidence of natural gas production in the Appling Field requires a new trial.

Respondents now try to reply to this argument by making a gross misstatement of the record. Respondents say at page 4 of their Supplemental Brief that "[t]he trial court permitted evidence of the production in both trials." This is untrue. In the first place, Respondents support this statement with two record references from the *second trial*. Petitioners concede that Justice Clark admitted some production evidence at the second trial; however, that evidence had absolutely no bearing on the antitrust liability issue, because Justice Clark had ruled that issue out of the case, holding that it had been decided at the first trial in which *no* production evidence was admitted. Petitioners' objection to the exclusion of production evidence relates only to the first trial.

Respondents' two record references under IV of their Supplemental Brief are apparently intended to show that even if no production evidence was admitted at the first trial, if it had been, it would have shown that Petitioners monopolized production and transportation of natural gas in the Appling Field. In fact, these references show the opposite. Mr. Tanner did testify that Petitioners leased the great majority of the Appling Field. Petitioners concede that they leased approximately 85 percent; however, as discussed in detail in Petitioners' prior briefs to this Court, it is undisputed that ownership of 85 percent of the surface acreage did not translate into 85 percent of the gas production.

Respondents correctly state that Mr. Minter of Alcoa testified that he had once predicted that over the life of the Appling Field Respondents and other small tract operators would produce slightly in excess of 30 percent of the natural gas from the Field at a cost of $31.6 million to Petitioners in gas pumped from under their land. Respondents neglect, however, to say that this prediction was made

before there was substantial production from the Field; and the final figures compiled after depletion of the Field reflected that the small tract operators produced approximately 50 percent of the gas. (Court of Appeals Record, 73-1633, Defendants' Exhibits 30, 52). It is well established that such a market share does not constitute monopoly power. See Reply Brief of Petitioners at 15-16. Once again Respondents' record distortions confirm they have no answer to the obvious injustice that resulted from the exclusion of all production evidence from the first trial.

IV.

Instruction 32 Should Not Have Been Given

In Petitioners' two briefs to this Court, they have shown that Instruction 32 was improper under the controlling law and under the facts of the case. Respondents now try to justify that instruction with a quotation from the trial court's opinion and two record references.

The trial court's statement that "[t]here was testimony that Alcoa caused a shutdown of Woods' wells on a spurious complaint; . . . ." is completely contrary to the evidence. Apparently the court had reference to complaints by Petitioners to the Texas Railroad Commission that Respondents' wells had insufficient surface casing under Railroad Commission rules designed to protect shallow water bearing sands. Such complaints are normal and customary in the industry. These complaints were the only legal or administrative actions taken by Petitioners that ever caused a "shutdown" of Respondents' wells. Brief reference was made at a trial to the surface casing problem by Mr. Allison, a witness for Petitioners, but when the questioning was pursued, the trial court sustained Petitioners' objections, stating "I really don't see the relevancy of the depth of the water pipes [surface casing]." (Court of

Appeals Record, 73-1633, pp. 3053-54, 3058, 3098, 3101). Thus the testimony on these complaints of causing a shutdown was struck as irrelevant. Respondents did not develop it and Petitioners had no opportunity for reply. Moreover, certainly no evidence was introduced that Petitioners' claims on surface casing were "spurious."

The quoted passage from the court's opinion on "standing instructions to file suits" relates to Petitioners' challenge to multiple completions by Respondents under Rule 37 of the Texas Railroad Commission. As explained at page 33 of the Petition for Writ of Certiorari, Railroad Commission rules required a separate suit challenging each new completion. Thus the multiple suits filed by Petitioners against Respondents and Joe Williams were not a matter of choice but were required to protect Petitioners' legal rights. No decision of any court makes these lawsuits part of an illegal scheme simply because more than one was filed.

In the final paragraph under V of their Supplemental Brief, Respondents attempt to show that Petitioners' legal and administrative actions against Respondents were illegally motivated. Mr. Woods, hardly a disinterested witness, gave uncorroborated testimony of the supposed threats made by Mr. Allison, an attorney for Alcoa. Mr. Allison categorically denied these threats. (Court of Appeals Record, 73-1633, pp. 3053-57; 3063-66).

Mr. Woods also gave uncorroborated testimony that an Alcoa attorney, who was deceased at the time of the second trial, had told him that Alcoa would not challenge the Railroad Commission's rules because they were valid with respect to the Appling Field, and yet, nevertheless, Alcoa sued. Interestingly, Mr. Woods never testified to these statements at the prior trial of this case or at the various state court cases between the instant parties. At the time of those actions, the Alcoa attorney was alive and could

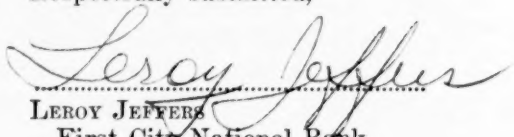
have rebutted Mr. Woods' testimony. He died shortly before the instant trial at which Woods' allegations appeared for the first time. Moreover, it is incredible to suggest that counsel for Alcoa would have made such a statement. Alcoa had determined that the operation of the ⅓-⅔ and multiple completion rules in the Appling Field would cost Petitioners $31.6 million over the life of the Field in gas pumped from under its land by Respondents and other small tract owners. It thus had a substantial interest in challenging these rules and eventually they were revised to provide for a more just allocation of the gas within the Field.

Finally, it should be noted that after the first trial judge found that the lawsuits were filed in good faith there was no suggestion by either party or any court that these actions were brought in bad faith. Not until Respondents presented their proposed charge to the court at the second trial of this case did that issue resurface. This makes clear that the charge was a last minute invention of Respondents with no justification in the record.

CONCLUSION

For the reasons stated in this brief and in Petitioners' Petition for Writ of Certiorari and Reply Brief, the Petition should be granted, the judgment of the Court of Appeals reversed, and the entire case remanded to the trial court for a single trial on the entire action.

Respectfully submitted,



LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners
Aluminum Company of America,
Crown Central Petroleum Corporation,
Lavaca Pipeline Company

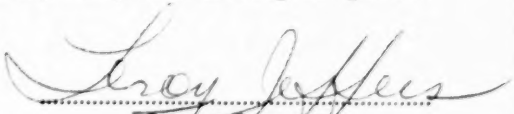
Of Counsel:

ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Reply of Petitioners to Respondents' Supplemental Brief were served upon Mr. Levert J. Able, 1201 First National Life Building, Houston, Texas 77002 and Mr. Herman V. Wright, Mandell & Wright, 1901 First National Life Building, Houston, Texas 77002, Counsel for Respondents, by placing the same in the United States mail, first class postage prepaid this 22 day of September, 1975, thus serving all parties required to be served.



LEROY JEFFERS
First City National Bank
Building
Houston, Texas 77002
Counsel for Petitioners